Supreme Court, U.S.
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88-1127

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1988

MAHINDER S. UBEROI, *Petitioner*

v.

UNIVERSITY OF COLORADO, *et al.*, *Respondents*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MAHINDER S. UBEROI, *pro se*
819 Sixth Street
Boulder, CO 80302
(303) 442-2879

January 6, 1989

QUESTIONS PRESENTED

1. Federal district court having ruled that *pro se* petitioner's action under Federal False Claims Act is meritorious, does it abuse its discretion in later granting "summary judgment" and attorney's fees to respondents, solely because a *pro se* petitioner may not maintain a *qui tam* claim and refusing to separate it from other claims and have a licensed attorney enter an appearance on behalf of petitioner?

2. Does a federal district court abuse its discretion and deny to *pro se* civil rights petitioner meaningful access to the court when for 4 years it repeatedly orders petitioner to complete all discovery and prepare pretrial order, and sets a trial date while all along respondents were resting on their motion to dismiss and had, of course, not answered the complaint?

3. Does a federal district court abuse its discretion in dismissing with prejudice civil rights claims for petitioner's failure to complete all discovery within 6 weeks after receiving respondents' answer to the complaint and refusing to grant even a single continuance of trial date?

4. Does a federal district court abuse its discretion when it awards respondents their attorney fees under 42 U.S.C. § 1988 when the civil rights claims were dismissed for failure to complete discovery and proceed to trial and petitioner was not given an opportunity to present evidence to show that his claims were conceivably meritorious?

5. Does a federal court of appeals abuse its discretion when it affirms by mere declaration that the federal court was within its limits of discretion when it granted summary judgments, and the judgments were no even final nor appealable under 28 U.S.C. § 1291?

6. Does a federal court of appeals act outside its jurisdiction when it affirms a federal district court's non-final order awarding attorney's fees which have not been reduced to a sum certain?

LIST OF PARTIES

MAHINDER S. UBEROI,

Petitioner

v.

UNIVERSITY OF COLORADO, an institution of State of Colorado; JACK K. ANDERSON; RICHARD J. BERNICK; FRED M. BETZ, JR.; PETER C. DIETZE; BYRON L. JOHNSON; SANDY F. KRAEMER; RACHEL B. NOEL; ROY H. SHORE; DAVID K. SUNDERLAND, Regents of University of Colorado; GERALDINE BEAN; LOUIS BEIN; JIM R. CARRIGAN; THOMAS S. MOON; ERIC W. SCHMIDT, former Regents of University of Colorado; ARNOLD R. WEBER, President of University of Colorado; ROLAND C. RAUTENSTRAUS, former President of University of Colorado; THEODORE C. VOLSKY, Vice President of University of Colorado; HARRISON SHULL, Chancellor of University of Colorado, Boulder; J. RUSSELL NELSON; LAWSON CROWE, former Chancellors of University of Colorado, Boulder; MILTON E. LIPETZ, Vice Chancellor of University of Colorado, Boulder; JAMES N. CORBRIDGE, JR., former Vice Chancellor of University of Colorado, Boulder; ALFRED R. SEABASS, Dean of Engineering College of University of Colorado; MAX S. PETERS; WILLIAM J. PIETENPOL; FRANK S. BARNES, former Deans of Engineering College of University of Colorado; KLAUS D. TIMMERHAUS; GERORGE J. MALER, Associate Deans of Engineering College of University of Colorado; GEORGE R. INGER, Chairman, Aerospace Department of University of Colorado; FRANK ESSENBURG; LOUIS C. GARBY, former Chairmen Aerospace Department of University of Colorado; JAMES D. FOCH; PETER FREYMUTH; DONALD KENNEDY; MARVIN LUTTGES; HOWARD SNYDER, faculty members of Aerospace Department of University of Colorado; C.FORBES DEWEY; THOMAS G. JONES; LUDWIG OSTER; GEORGE C. VLASES; RICHARD S. BUCY; JOSHUA MENKES, former faculty members of Aerospace Department of University of Colorado; WOLFGANG BANK; RUSSELL MEINZER, staff members, Aerospace Depart-

ment of University of Colorado; DAVID R. KASSOY, faculty member of Mechanical Engineering Department of University of Colorado; WILMAR F. BERNTHAL; FRANZ MOHLING; JONATHON B. CHASE, former Chairmen of Privilege and Tenure Committee of University of Colorado; PETER BECKMANN; LEONARD G. BOONIN; LAWRENCE D. COOLIDGE; JAMES P. FRANK; EUGENE S. GOLLIN; DOROTHY GREGG; CHARLES A. KENEVAN; PHYLLIS B. KENEVAN; JOSEPH LAZAR; PHILLIP I. MITTERLING; MELVIN NEWMAN; PETER N. SIMON; GILBERT WHITE; JAMES D. WOLF; JAMES R. WAILES, former members of Privilege and Tenure Committee of University of Colorado,

Respondents.

In addition to civil rights, this case involved claim under Federal False Claims Act. Initially, United States was not indicated as a party. On October 17, 1983, Plaintiff filed a motion to amend and tendered the amendment to include **United States by Mahinder S. Uberoi** as a plaintiff. District Court granted the motion on December 4, 1985. The clerk of the court has not incorporated the amendment in the caption of the action.

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I. **The federal appeals court sanctioned the federal district court's refusal to permit the maintenance of an action under Federal False Claims Act which the district court had adjudged to be meritorious and this contravened the law and federal policy to stimulate private action to protect the government against fraud.** 23

II. **The federal appeals court sanctioned the district court's award of attorney's fees and costs against an informer in a meritorious action under Federal False Claims Act which contravenes the law and federal policy that an informer or "whistle blower" is to be protected and rewarded but not punished.** 24

III. **The federal appeals court sanctioned the federal district court's extreme departure from accepted and usual course of judicial proceedings.** 25

IV. **A federal appeals court denies meaningful review when (a) it affirms summary judgments on some claims with the declaration that the district court was within its limits of discretion and (b) refuses to consider that dismissal of other claims violated the appeals court's standards for dismissal.** 26

V. **The decisions of the Tenth and Eight Circuits are in conflict on award of attorney's fees to respondents under 42 U.S.C. § 1988 when a civil rights claim is dismissed for failure to proceed to trial and petitioner was not given an opportunity to present evidence to show that his claims were conceivably meritorious.** 28

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1988

MAHINDER S. UBEROI, ***Petitioner***

v.

UNIVERSITY OF COLORADO, ***et al., Respondents***

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

The petitioner, Mahinder S. Uberoi, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Tenth Circuit, entered in the above proceeding on July 6, 1988, rehearing denied on September 15, 1988, and a previous judgment and opinion in this case entered on July 7, 1987, rehearing denied on October 19, 1987.

OPINIONS BELOW

The opinion of the Court of Appeals for the Tenth Circuit has not been reported. It is reprinted in the appendix hereto, p. 1a, *infra.*

The decision of the United States District Court for the District of Colorado is reprinted in the appendix hereto, p. 4a, *infra.*

The earlier opinion of the Court of Appeals for the Tenth Circuit has not been reported. It is reprinted in the appendix hereto, p.7a *infra.*

The earlier decision of the United States District Court for the District of Colorado is reprinted in the appendix hereto, p.9a *infra.*

JURISDICTION

On May 20, 1982, invoking federal jurisdiction under 42 U.S.C. §§ 1981, 1983, 1985, 1988, I and XIV Amendments and 31 U.S.C. §§ 231, 232, now §§3729-31 and pendant jurisdiction over state claims, petitioner brought this suit in the District for Colorado. On June 16, 1986, District Court dismissed the case with prejudice for failure to complete discovery, on July 7, 1986 denied Rule 59(e) motion, and on October 14, 1986, on its own motion, issued an order *nunc pro tunc* to the order of July 7, 1986, that the *dismissal and award of attorney's fees without reducing it to a sum certain was certified as final under Rule* 54(b), *Fed.* R. Civ.P.

On petitioner's first appeal, the Tenth Circuit on July 7, 1987, entered an order and judgment affirming District Court's order, and on October 19, 1987, denied petition for rehearing.

On April 10, 1987, District Court reduced the award of attorney's fees to a sum certain. On July 22, 1987, it denied motion to alter or amend under Rule 59(e), Fed. R. Civ. P.

On petitioner's second appeal, the Tenth Circuit on July 6, 1988, entered an order and judgment affirming District Court's order, and on September 15, 1988, denied petition for rehearing.

On November 29, 1988, Justice White ordered that the time for filing this petition for writ of certiorari be extended to and including January 13, 1989.

The jurisdiction of this Court to review the judgment of the Tenth Circuit is invoked under 28U.S.C. §1254(1).

Petitioner improvidently petitioned this court to review the non-final first judgment of the Tenth Circuit which affirmed the district court's award of attorney's fees which were *not reduced to a sum certain.* It may be deemed that the petition, case no. 87-1351, was denied for lack of jurisdiction.

Review by certiorari is not a right of the party, but lies in the discretion of the Federal Supreme Court, so that the fact that a final decree has not been entered may be deemed a sufficient ground for refusing the writ. *John Simmons Co. v. Grier Bros. Co.* 258 U.S. 82 (1922).

The United States Supreme Court will not treat an earlier denial of certiorari to a Federal Court of Appeals as final adjudication where

the denial came at an interlocutory stage in the proceeding in which the issues had been raised. *Washington v. Washington State Commercial Passenger Fishing Vessel Assoc.* 443 U.S. 658 (1978).

The first judgment of the Tenth Circuit became final only when its second judgment affirmed the district court's award of attorney's fee which were reduced to a *sum certain.* This court may properly review, at this time, the first and the second judgments of the Tenth Circuit.

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES INVOLVED

Fed. R.Civ. P., Rule 16(f), sanctions; Rule 37(b), failure to comply with order; Rule 56(b) summary judgment for defending party; 31 U.S.C. §§3729-31, Federal False Claims Act; 42 U.S.C. § 1988, proceedings in vindication of civil rights; Rule 105(A) of Federal District Court for Colorado; and I Amendment, right of access to courts. Text of the provisions is set forth in the appendix hereto.

STATEMENT OF THE CASE

Petitioner has been a professor at University of Colorado for 26 years and three terms Chairman of Department of Aerospace Engineering. He is a male of Asians Indian origin. In 1982, he instituted action in U.S. District Court for the District of Colorado, for damages, declaratory and injunctive relief under 42 U.S.C. §§1981, 1983, 1985, 1988, I and XIV Amendments, for deprivation of civil rights and conspiracy to interfere with civil rights; and *qui tam* claim under Federal False Claims Act, 31 U.S.C. §§231, 232, now §§3729-31.

The complaint alleged that petitioner was a tenured professor at University of Michigan when University of Colorado asked him to become professor and chairman of Aerospace Engineering Department with numerous promises about his own academic and salary advancements; and promises of an affirmative policy to hire women, racial and ethnic minorities. And that respondents conspired to:

(a) create discriminatory conditions of employment and work for petitioner, his associates, post-doctoral fellows, and students who were minorities and/or women;

(b) interfere with petitioner's program to encourage women and minorities to pursue careers in science and engineering;

(c) expose petitioner to hazards and carcinogenic chemicals;

(d) lock out petitioner from his laboratories;

(e) destroy petitioner's research in progress;

(f) prevent petitioner from teaching;

(g) exclude petitioner from higher positions at the University;

(h) disrupt petitioner's faculty fellowship, sabbatical leave and research professorship;

(i) fraudulently evaluate petitioner's work and give him unfair merit raises;

(j) disrupt the work of petitioner's students;

(k) retaliate against petitioner for his contact with Colorado Legislature;

(l) interfere with petitioner's research grants from the United States;

(m) and to charge false direct and indirect costs to petitioner's and other grants; and that respondents' liability under Federal False Claims Act was $21,004,280.00.

The complaint also alleged pendant state claims of interference and fraudulent interference with petitioner's employment contract of a tenured professor with the University.

PROCEEDINGS IN DISTRICT COURT FROM MAY 20, 1982, TO FEBRUARY 27, 1986, BEFORE RESPONDENTS HAD EVEN ANSWERED THE COMPLAINT

Proceedings Before District Judge Richard P. Matsch And Magistrate Donald E. Abram

On May 20, 1982, the case was filed and assigned to District Judge Richard P. Matsch, who did not recuse himself and all other judges of the District for Colorado, even though one of them, Jim Carrigan, was a named defendant for his conduct before he became a district judge.

On June 15, 1982, respondents moved to dismiss. Instead of ruling on the motion to dismiss, District Court declared that the case was "now at issue," called a discovery conference pursuant to Rule 26(f) of Fed. R. Civ. P. and ordered that counsel be at that time prepared to discuss a proposed plan and schedule of discovery and setting limitations on discovery.

At the conference on November 23, 1982, Judge Matsch stated that respondent Jim Carrigan, one time regent of the University, is a friend of his and a fellow judge and that he had worked with respondent Jack Kent Anderson and that he knew respondent Rachel Noel. Petitioner was mindful of many reported cases where a *pro se* litigant started out by filing an affidavit of prejudice against the judges and thus he did not move for disqualification. Resolution L of Judicial Council of the United States cautions that "Asking counsel to indicate their approval of a judge remaining in a particular case is fraught with potential coercive elements which makes this practice undesirable." Judge Matsch referred the case to Magistrate Donald E. Abram "for the purposes of developing a discovery plan and for simplification of issues and resolution of initial discovery disputes."

District Court turned the discovery process upside down. Instead of permitting discovery relevant to the subject matter of the litigation, Rule 26(b)(1), Fed. R. Civ. P., so that issues could be formulated, on December 15, 1982, it ordered that:

> "the plaintiff shall, by December 30, 1982, set forth in outline form the issue and then the discovery he will be needing under

that particular issue. The same shall be sent to the Magistrate with a copy to counsel, no later than December 30, 1982."

Even though respondents had not answered the complaint, the District Court, on June 27, 1983, ordered that all discovery shall be completed no later than September 30, 1983. On March 13, 1984, it ordered that the parties shall set forth the remaining discovery by April 6, 1984. On May 9, 1984, it ordered pretrial conference for July 16, 1984, and ordered petitioner to prepare pretrial order. On October 18, 1984, it again ordered pretrial conference for December 17, 1984, and ordered petitioner to prepare a pretrial order. On December 20, 1984, once again, for the third time, it ordered pretrial conference for January 14, 1985, and ordered petitioner to prepare pretrial order.

Petitioner was compelled to prepare a document entitled "Pretrial Order" following the format prescribed by local rules of the district court and to file it with Magistrate and serve it on respondents.

Counsel for respondents constantly acted in unprofessional manner and the district court refused to reprimand them. For example, at the deposition of respondent R. A. Christopher, counsel interposed, "But it [the question posed to the deponent] does not have a damn thing to do with this law suit and your Complaint." At the deposition of respondent A. R. Seabass, counsel interposed, "I have read the Complaint, and I don't think it [the question posed to the deponent] has a damn thing to do with the Complaint. So let us go on with it."

Petitioner believes that due process incorporates civilized proceedings. The Court in *McNabb v. United States*, 318 U.S. 332 (1943), held that courts had the duty of "establishing and maintaining civilized standards of procedures. . ." id at 340.

In response to a question to deponent, respondent A. R. Seabass, counsel answered, "And the answer is yes, in one instance that you previously referred to?" while the deponent protested, "I don't know. I have to be very careful on that. I don't really know what changes the Space Committee might have made."

Pursuant to District Court order, deposition of respondent A. R. Weber was held in a very small room at the courthouse. The respondent insisted on smoking and fumigated the room. Petitioner was choked and his objections were ignored. At the continuation of the

deposition on another date, the respondent again insisted on smoking.

District Court, in dismissing the action, page 14a, *infra*, ruled:

"One of the clearest examples of plaintiff pro se's vexations conduct in this matter arises from his motion to sanction defendants' counsel because a defendant smoked during the deposition and put his foot on the table....Plaintiff pro se also moved this court to sanction defendants because defendants' counsel used the word 'damn' during a heated discussion at a deposition. This is another example of plaintiff pro se's attempt to use this Court to control and harass defendants.

"All of the above is recited to lay a foundation demonstrating that during the first three years of this case, discovery was going on and that plaintiff pro se was undaunted in his attempts to consume the time of defendants and this Court with endless and more often than not frivolous attacks on defendants and their counsel. This is the foundation upon which the Court must now review plaintiff pro se's assertion that he has not had sufficient time to discover his case and that the case is nowhere near being ready for trial because of this Court's oppressive orders."

On January 26, 1984, District Court ordered petitioner to prepare a *proposed* amended complaint narrowing the issues. Petitioner prepared such a document, filed it with Magistrate and served it on counsel for respondents. They all ignored it. This is yet an example of unnecessary and burdensome orders of District Court.

On January 28, 1985, petitioner filed a motion for temporary restraining order to prevent respondents from destroying, dismantling or moving petitioner's research experiments. On January 30, 1985, respondents filed their response to the motion. Therein, they repeatedly subscribed to the falsehoods that a pretrial order existed at the time and that parts of petitioner's motion for temporary restraining order were contained in the nonexisting pretrial order.

District Court refused to consider petitioner's motion for preliminary injunction, filed November 23, 1982, motion for temporary restraining order, filed January 28, 1985, motions for rulings on unresolved motions, letters by certified mail, and letters served on it by hand, even though District Court had asked petitioner to so remind it

of pending matters. Judge Matsch recused himself and all other judges of the district, on August 8, 1985, only after petitioner filed a petition for a writ of mandamus with the Tenth Circuit, Case No. 85-2128.

In absence of statutory provision, injunctive relief is not a matter of right and granting or refusing of such relief rests in the sound discretion of the Court; but exercise of such discretion should not be arbitrary. *Goldammer v. Fay*, 326 F.2d 268 (10th Cir. 1964).

Proceedings Before District Judge Lee R. West of Western Oklahoma District, On Assignment To The District For Colorado

About October 15, 1985, the case was assigned to Judge West. He persistently issued oppressive orders. He ordered that petitioner appear for a hearing in Oklahoma City. In several pleadings, letter to Chief Circuit Judge William J. Hollaway, Jr., who had assigned the case to Judge West, and in telephone conversations with Judge West's law clerk, petitioner repeatedly stated that Judge West did not have the authority, in face of petitioner's objection, to order petitioner to appear for a proceeding in Oklahoma City when the case is pending in the District for Colorado. Fed. R. Civ. P., Rule 77(b). That, in any case, the proceedings in Oklahoma City should not be held on November 25 and 26, 1985, when petitioner was scheduled to present his research at the American Physical Society meeting in Tucson, Arizona. Nevertheless, Judge West, by his law clerk ordered that petitioner, who was in Tucson, Arizona, forego his research presentation and appear next day in Oklahoma City. Petitioner complied.

The all day hearing was, in fact, a summary trial on the record. Judge West examined petitioner on all allegations in the Complaint, formed and expressed his opinions about the action. At one point, Judge West stated that respondents' alleged misconduct was simply a response to changing needs of the respondent University. Judge West denied petitioner's motions for temporary restraining order and for preliminary injunction with the declaration that it was a waste of judicial resources to consider them.

At the conference with Judge West in Oklahoma City, on November 26, 1985, and in Status Conference Report filed on December 4,

1985, respondents suggested the following deadlines: "Exchange of witnesses and exhibits," ten months after the Court rules on pending motions; "Discovery cutoff," ten months after, and "Trial:" twelve months after the court rules on pending motions. This would have put trial in June 1987. Petitioner's suggestion, filed November 22, 1985, was that respondents were resting on their motion to dismiss filed about June 14, 1982, and that the case has not progressed to a stage where petitioner could reasonably suggest deadlines for discovery cutoff and date for trial.

At the hearing and in an order filed on December 4, 1985, Judge West set April 15, 1986, as the discovery cutoff date, *even though respondents had not answered the complaint* since District Court, for nearly four years, had not ruled on their motion to dismiss.

On February 7, 1986, Judge West denied, in most respects, respondents' nearly 4 year old motion to dismiss and granted it in part by dismissing some claims under 42 U.S.C. § 1983 against University of Colorado since it was not a "person" under the statute.

During the telephone conference on February 19, 1986, even before respondents had answered the complaint and again disregarding the parties' positions on schedules for pretrial matters and trial, Judge West, *sua sponte*, set April 1, 1986, as the deadline for exchange of lists of witnesses and exhibits; completion of discovery by April 15, 1986; and trial on June 2, 1986. He stated at least 3 times that he was certain to hold a summary jury trial in this case.

PROCEEDINGS FROM THE TIME OF RESPONDENTS' ANSWER ON FEBRUARY 27, 1986, TO DISMISSAL ON MAY 28, 1986, FOR FAILURE TO COMPLETE DISCOVERY AND PREPARE FOR TRIAL SET FOR JUNE 2, 1986

Petitioner received respondents' answer to the complaint on February 27, 1986. One month was available before the April 1, 1986 deadline for exchange of witnesses and exhibits. During this month of March 1986, respondents filed 21 motions for summary judgments and 21 briefs in support of them, and filed 5 responses to petitioner's pleadings. For example, on March 17, 1986, respondents resubmitted

their motion for summary judgment on claims based on Federal False Claims Act, reiterating their old argument that petitioner as an unlicensed *pro se* litigant may not maintain a *qui tam* action.

Petitioner had responded that he had purposely limited his claim on behalf of the United States, under Federal False Claims Act, to only those false claims which also injured petitioner and his research grants from the United States and involved the same operational facts as the operational facts in his own claims. That any separation of the claims would lead to re-litigation of the same issues. On February 5, 1986, District Court had ruled that:

> "Plaintiff pro se mailed a copy of his complaint to the Attorney General for the United States of America. The return receipt for the mailing indicates that the complaint was received on June 15, 1982. Therefore, the Government is deemed to have notice of plaintiff pro se's claim pursuant to the Federal False Claims Act. In addition by default, the Government is deemed to have declined to enter its appearance herein . . . Defendants contend the Government was in possession of sufficient information to adequately investigate claims made by plaintiff pro se . . . .This Court is not, however, convinced the information possessed by the Government would have revealed it was being charged for (1) equipment defendants otherwise acquired free; (2) salary amounts beyond the cost sharing requirement; and (3) inflated research costs . . . . Thus, plaintiff pro se's action based upon the Federal False Claims Act should not be dismissed."

Nevertheless, on April 10, 1986, the District Court granted "summary judgment" on these claims. On May 14, 1986, it denied petitioner's motion to separate these claims and have a licensed attorney enter an appearance on behalf of petitioner.

On March 14, 1986, petitioner filed a motion to reinstate his claims under 42 U.S.C. § 1983, since Colorado Supreme Court had just then ruled that the statute applies to University of Colorado. *Uberoi v. University of Colorado*, 713 P.2d 894 (Colo. 1986). District Court reinstated petitioner's claims under 42 U.S.C. § 1983 in the order signed in Oklahoma City on March 24, 1986, entered in the docket in Denver, Colorado, on March 27, 1986, and received by petitioner on Monday afternoon, March 31, 1986.

Petitioner had no time to complete discovery involving scores of respondents, and prepare lists of exhibits and witnesses by April 1, 1986, especially on claims whose reinstatement petitioner had learned only the night before.

On April 1, 1986, respondents filed their list of 132 witnesses in chief. District Court had allowed 15 days, from April 1, to April 15, 1986, to ascertain the substance and scope of the testimony of witnesses which was impossible considering their large number.

Petitioner moved to postpone the schedule of dates for pretrial matters and trial since it was impossible to meet the deadlines which were set on February 19, 1986, *even before respondents had answered the complaint* and no one knew the discovery needs of the case. Except for extending the deadline for submission of exhibits and witnesses to April 21, 1986, District Court denied the motion by an order filed on April 10, 1986.

During this six week period, March 1, 1986 to April 15, 1986 deadline, the docket sheets show about 76 entries for motions, briefs, responses, orders, etc. which completely occupied petitioner with matters other than discovery. During this time petitioner's mother passed away. On April 21, 1986, petitioner filed motion to reconsider denial of extension of time, stating, *inter alia*, that respondents themselves had suggested dates for pretrial matters and trial which were about a year beyond the deadlines set, *sua sponte*, by District Court. However, respondents now objected to petitioner's motion to reconsider denial of extension of time, filed May 14, 1986.

On April 28, 1986, respondents filed their motion to dismiss, under Rule 16(f), Fed. R. Civ. P. On May 8, 1986, petitioner filed his response and stated, *inter alia*, that counsel for respondents had been appraised all along that unless the time for discovery is extended by the trial court, petitioner's list of witnesses is the list of persons who have been deposed, fully or partially, and that his list of exhibits is the sum of all these exhibits to the depositions. Petitioner attached to his response parts of the depositions which supplied the lists of witnesses and exhibits.

Petitioner complied with various deadlines set by District Court, to wit: On May 15, 1986, petitioner filed his suggestions for *voir dire* to the jury and tendered a proposed pretrial order, which was as com-

plete as possible considering the status of the case. On May 27, 1986, petitioner filed his trial brief.

On May 19, 1986, respondents filed their Supplemental Arguments in support of their Rule 16(f) motion, and on May 27, 1986, their supplemental brief.

On May 28, 1986, in open court and in the order filed June 16, 1986, District Court dismissed the case with prejudice, respondents to recover all their costs and attorney's fees for entire four years of litigation since petitioner had failed to complete discovery and prepare for trial, p.9a *infra*. The motion to alter or amend judgement was denied in an order filed July 7, 1986.

Petitioner filed notice of appeal in the district court which on its own motion certified the judgment as final under Rule 54(b), Fed R. Civ. P. He realized too late that the judgment was not final nor appealable under 28 U.S.C. §1291, since the award of attorney's fees was not reduced to a sum certain. *Phelphs v. Washburn University at Topeka*, 807 F.2d153 (10th Cir. 1986).

PROCEEDINGS ON THE FIRST APPEAL BEFORE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT, HELD WITHOUT JURISDICTION

Pursuant to the then existing Rules of the Tenth Circuit, the case was submitted on memorandum briefs and the court did not ask for full briefs. *Without any citation of authorities*, on July 7, 1987, it affirmed the judgment of District Court. P. 7a *infra*.

Petitioner moved for rehearing and stated:

> (a) District Court had exceeded the limits of discretion set by this Court:
> "Rule 37 should not be construed to authorize dismissal of [a] complaint because of petitioner's noncompliance with a pretrial production order when it has been established that failure to comply has been due to inability and not due to willfulness, bad faith or any fault of the petitioner." *Societe Internationale v. Rogers*, 357 U.S. 197, 212 (1958); *National Hockey League v. Metropolitan Hockey Club, Inc.*, 427 U.S. 639, 640 (1976);

(b) that the Tenth Circuit has set certain standards for review of dismissal of a case by a district court. *In re Baker*, 744 F.2d 1438 (10th Cir. en banc, 1984); *Woodmore v. GIT-N-GO*, 790 F.2d 1497 (10th Cir. 1986). That petitioner is entitled to review under these standards, such as:

> (i) The issue of discretion must not be viewed in isolation. Rather, we must look at the totality of circumstances, including the specific case under review, the total management problems for courts, and access and cost problems for litigants. *In re Baker*, at 1440;
>
> (ii) Certainly the sanctions concepts contained in subsection (f) [of Rule 16] is a codification of the purpose to insist *the court*, the lawyers and parties abandon habits which unreasonably delay and otherwise interfere with expeditious management of trial preparation. *In re Baker* at 1441; (emphasis added);
>
> (iii) We hold that, when a case is dismissed with prejudice or dismissed without prejudice at a time when the statute of limitation would have banned refiling, a trial court must explain why it imposed the extreme sanction of dismissal. *Woodmore v. GIT-N-GO*, at 1499.

(c) that before District Court dismissed the action with prejudice, it had granted summary judgments on some claims. The Appeals Court should review the judgments using the established standards for review of grant of summary judgment, but not by a declaration that District Court was within the limits of its discretion;

(d) that the Appeals Court ruled that because the dismissal was appropriate it need not consider petitioner's other arguments. However, they were relevant to the reasons given by District Court for its dismissal of the action. For example, District Court ruled that petitioner had 4 years to discover his case while petitioner pleaded that the action was filed on May 20, 1982, and only on February 7, 1986, 3 years and 8 months later, the court ruled on respondents' motions to dismiss and/or summary judg-

ment. It amended the ruling by reinstating some of petitioner's claims in an order signed in Oklahoma City on March 24, 1986, docketed in Denver, Colorado on March 27, 1986, received by petitioner on Monday afternoon, March 31, 1986.

Even before respondents had answered the complaint, the District Court on February 19, 1986, had set April 1, 1986, as the deadline by which petitioner was required to file his list of witnesses and exhibits and serve them on respondents. It was *impossible* to comply with the order, since *one night* was not enough for petitioner to review his records in support of these claims, conduct further legal research, request production of and direct interrogatories to respondents relative to these claims and then prepare the lists of witnesses and exhibits on these claims. The District Court's extension of the deadline to April 21, 1986, did not help since responses to request for production and interrogatories take at least 30 days. The only discovery method open to petitioner was to take depositions, which also require at least five days notice. During these few days available, petitioner's mother passed away. As ordered by the Court, petitioner also had to file all dispositive motions by May 1, 1986, and file all stipulations, joint statement of the case, requested *voir dire*, trial briefs, by May 15, 1986, and objections to the above trial submissions to be filed 5 days thereafter, final pretrial order approved by all counsel to be filed by May 15, 1986; and prepare for jury trial on June 2, 1986; and

(e) that District Court had ruled that petitioner had stated a valid claim under Federal False Claims Act. It granted summary judgment for respondents since an unlicensed *pro se* petitioner may not bring a *qui tam* claim even though the material facts for his own claims are the same as for *qui tam* claim, and it refused to separate the *qui tam* claim and have a licensed attorney enter an appearance on behalf of *pro se* petitioner. That sanctions, if any, against petitioner should be applied so as not to extinguish the claims and interest of the United States advanced by petitioner under Federal False Claims Act.

On October 19, 1987, the Appeals Court denied rehearing.

Proceedings in District Court to reduce the award of costs and attorney's fees to a sum certain

On June 9, 1986 respondents' attorneys, Tharp and Ayres filed their affidavits which incorporated a bill for costs and attorney's fees with the following breakdown:

Costs:	$5,987.93
Fees:	
Mr. Tharp at $125/hr.	64,602.00
Mr. Ayres at $125/hr.	37,875.00
Ms. Augustine at $90/hr.	900.00
TOTAL	$109,364.93

On June 18, 1986, plaintiff filed a response and stated, *inter alia*, that:

> Costs should be disallowed, since they are mainly for depositions which were not used at trial.
>
> Ayres and Augustine were salaried employees of respondent university and their hourly wages were a fraction of $125 or $90 used in the bill.
>
> The University regularly bills the services of the faculty and staff under research contracts at the rates actually paid but not at some "prevailing rates" which the employees could get in the open market.

Ayres' affidavit stated that his time and effort in the bill were "reconstructed." This did not meet the law in the Tenth Circuit, *Ramos v. Lamm* 713 F.2d 546 (10th Cir. 1983) and Rule 105(A) of the District Court that the "party requesting costs must submit clear, meticulous, contemporaneous time and expense records reflecting all hours for which compensation is requested and the allotment of these hours to the specific tasks performed." P. 32a, *infra*. and

> The bill was by reference incorporated into the affidavits and contained at least 22 false entries and the court should apply sanctions against respondents under Rule 11, Fed. R. Cir. P.

On October 14, 1986, the court ruled that:

> It awarded attorney fees in accordance with 42 U.S.C. §1988...
> In reviewing the affidavits and time records submitted by attorneys, the court cannot allow as part of a reasonable fee the attorney fees for services in actions in other courts... and duplication of attorney fees when one attorney's participation would suffice...
> Attorney Tharp's records fail to meet the requirements of the Circuit and the Local Rules and, consequently will be denied...
> There are repeated instances in which action in state court are included on Tharp's billings, e.g., for 6-8-82; 7-9-82; 8-27-82; 8-30-82; 12-10-82; 12-29-82; and 3-12-84.

On October 30, 1986 respondents filed an amended application for fees. On November 4, 1986, petitioner filed a response, stating *inter alia* that Tharp's amended application should be rejected since it was a Rule 59(e), Fed. R. Civil. P., motion to alter and/or amend judgment and must be filed within 10 day jurisdictional period which cannot be extended in the discretion of the district court. *Glass v. Seaboard Coast Line R. Co.*, 714 F. 2d 1107, 1109 (11th Cir., 1983). Applications of Ayres and Augustine should be denied since they still did not meet the Tenth Circuit law and the Local Rule 105 (A).

On February 9, 1987, the court ordered that:

> Initially the court states that [respondents' amended application for attorney fees] is considered under the provisions of Rule 60(b)(1), rather than Rule 59(e) motion... Additionally, when the court finds significant grounds, it may provide relief under 60(b)(6)...
> With salaried public attorneys, the court must rely on the comparable documentation and summaries, due to the fact records such as those provided by private attorneys are not always available... Additionally, the court relies on the oath of attorneys, who as court officers attest that the claims presented are based on "documentation presently maintained and existing."

It should be noted that the court had earlier ruled that affidavits of court officers attorneys were fraudulent in that the affidavits incorporated the bill in which "There are repeated instances in which actions in state court are included in Tharp's billings."

In spite of petitioner's repeated requests, "the documents" which were used to reconstruct the bill were never made available to him nor to the court.

On April 10, 1987, the court awarded respondents attorney's fee of $74,886.00

On February 9, 1987, the court had affirmed awards to respondents of $3,704.78 for depositions never used at trial and $497.71 for counsel's travel for a hearing in Oklahoma City when petitioner had repeatedly stated that District Judge West did not have authority, in face of petitioner's objection, to hold a hearing in Oklahoma City when the case is pending in the District for Colorado. Fed. R. Civ. P., Rule 77(b).

On July 22, 1987, the court denied petitioner's Rule 59(e) motion to alter or amend judgment.

PROCEEDINGS IN DISTRICT COURT FOR CERTIFICATION OF ORDERS AND DECREES, AS APPEALABLE JUDGMENTS UNDER RULE 54(b), FED. R. CIVIL P.

On April 8, 1986, the court dismissed petitioner's claims that respondents' discriminations against petitioner's research associate and students adversely affected petitioner's academic work. The court reasoned that petitioner may not assert rights of others even though their denial impacted him.

On April 10, 1986, the court granted summery judgments for respondents since a *pro se* petitioner may not bring a *qui tam* claim under Federal False Claims Act, and refused to separate the claim and have a licensed attorney enter an appearance on behalf of petitioner.

On May 14, 1986, the court granted summary judgments for some respondents since the claims against them were barred by statute of limitation even though respondents had fraudulently concealed petitioner's cause of action.

On April 17, 1987, before the entry of final judgment, petitioner moved to certify the just cited and other such orders and decrees under Rule 54(b), since these were entered before June 16, 1985, when the remaining claims were dismissed for failure to complete discovery and proceed to trial. Prior judgments should receive appellate review on the basis of their own record and merits.

On July 22, 1987, the court denied petitioner's Rule 59(e) motion to alter or amend judgment which became final and appealable. The court also denied certification under Rule 54(b), although petitioner believes this to be immaterial since the court had nothing further to do and all interlocutory decrees, and summary judgments became final and appealable under 28 U.S.C.§1291.

FIRST REVIEW BY THE SUPREME COURT

In the case No. 87-1351, petitioner sought from this court a writ of certiorari to review the first judgment and opinion of the United States Court of Appeals for the Tenth Circuit, entered in this case on July 7, 1987, rehearing was denied on October 19, 1987.

This court denied the petition on April 4, 1988, and denied rehearing on May 31, 1988. The Court of Appeals had no jurisdiction under 28 U.S.C. 1291 to review non-final decrees and order of District Court. Now, this court may properly review the judgments of the Court of Court Appeals on the first and the second appeals. See p.2 *supra.*

PROCEEDINGS ON THE SECOND APPEAL BEFORE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Petitioner believed that the court lacked jurisdiction on first appeal and the entire case was up for review. On July 6, 1988, it affirmed the judgment of District Court. P. 3a. *infra.*

ON FIRST APPEAL THE COURT OF APPEALS ACTED WITHOUT JURISDICTION. ON SECOND APPEAL IT SHOULD HAVE PROPERLY REVIEWED ALL APPEALABLE DECREES AND ORDERS OF THE DISTRICT COURT

The judgment dated July 6, 1988, was received by petitioner on July 8, 1988. On July 6, 1988, he had already filed a formal motion that on the first appeal none of the decrees and orders of the district court were appealable under 28 U.S.C. § 1291 and the court of appeals acted without jurisdiction. On the second appeal the court should properly review all appealable decrees and orders of the district court. In the motion and in the petition for rehearing and suggestion for hearing *en banc*, filed August 3, 1988, petitioner raised, *inter alia*, the following points of law or facts which the court had all along overlooked or misapprehended.

The Question of jurisdiction is primary and fundamental in every case and cannot be waived by the parties or overlooked by the court. It may be raised at any time by any party, or even by the court of its own motion. *Mansfield, C. & L. M.R. Co. v. Swan*, 111 U.S. 379 (1894).

An objection to the jurisdiction of a court is not too late because first raised after entry of judgment. *Panhandle Eastern Pipe Line Co. v. Federal Power Commission*, 324 U.S. 635 (1945).

The district court granted summary judgments for respondents on some claims and dismissed with prejudice some other claims for failure to state cognizable claims. Later, it dismissed with prejudice all remaining claims for failure to complete discovery and proceed to trial. It awarded respondents their costs and attorney's fees for defending each and every claim, without reducing the awards to a sum certain. The decrees and orders of the district were not uniquely separable from the issue of attorney's fees and expenses, and therefore they were not final nor appealable under 28 U.S.C. 1291. Furthermore, the award of attorney's fees and expenses was also not final nor appealable under 28 U.S.C. 1291, since it was not reduced to a sum certain. To do otherwise would amount to permitting an appeal on liability without calculating damages, a course that is

prohibited in vast majority of cases. *See Liberty Mutual Ins. Co. v. Wetzel*, 424 U.S. 737 (1976).

The Court in *Phelps v. Washburn University of Topeka*, 807 F.2d 153 (10th Cir. 1986) ruled that:

Thus, we conclude that if an award of attorney's fees is not reduced to a sum certain, it is not final (at 154). We conclude that since the order was neither final nor appealable within the meaning of 28 U.S.C. Section 1291 at the time the notices of appeal were filed, this court lacks jurisdiction to entertain these appeals. *Cf. A.O. Smith Corp. v. Sims Consolidated, Ltd.*, 647 F.2d 118, 120-121 (10th Cir. 1981) (a jurisdictional defect cannot be cured by means of a subsequent Rule 54(b) certification). *Phelps* at 155. *Strey v. Hunt Int. Resources* 696 F2d 87, 88 (10th Cir. 1982) held that Rule 54(b) permits an entry of appealable judgment only for claims which are finally decided. See *Curtis-Wright Corp. v. G.E.* 446 U.S. 1, 7 (1980).

There are specific statutes, rules and case law which govern the dismissal with prejudice or summary judgment on each particular claim and govern the award of attorney's fees and expenses to respondents for defending a particular claim, which the court of appeals is required to but did not follow in its review. It simply declared that *all was within the discretion of the district court* and the difference between the right and wrong law was just a matter of nuances.

ACTION UNDER FEDERAL FALSE CLAIMS ACT

After an all-day hearing or summary trial in Oklahoma City on November 26, 1986, the district court on February 7, 1986, ruled that petitioner *pro se's* action based on Federal False claims Act was meritorious and should not be dismissed. P.10 *supra.*

Disregarding this "law of the case", on April 10, 1986, District Court granted "summary judgment" on these claims, since a *pro se* plaintiff may not bring a *qui tam* action. This issue had been fully briefed and argued at the all-day hearing. Petitioner asserted that respondents defrauded him as well as the Government and he should be allowed to maintain the action to avoid two suits on the same claims, one *pro se* and another by counsel.

The court in the *United States Ex Rel. Woodard v. County View Care*, 797, F. 2d 888 (10th Cir. 1986) at 894 ruled that:

It is acknowledged that in the traditional "informer" type *qui tam* action the plaintiff will have suffered no economic loss, but where as here, the *qui tam* plaintiff's injury occurs simultaneously with the federal government's injury the [plaintiff] state should not have to pursue a state claim in another proceeding.

On May 1, 1986, petitioner filed Motion to sever his claims on behalf of United States and have a licensed attorney enter appearance on his behalf. On May 14, 1988, trial court ruled that it "remains firm that a *pro se* plaintiff may not bring a Federal False Claims Action", and denied the request for separation by refusing to consider it.

In this action respondents incurred almost all of their expenses and attorney's fees for defense of claims under False Claims Act. They are not entitled to fees and expenses under the relevant statute 31 U.S.C. § 3730 (d) (3), since "summary judgment" was granted because *pro se* petitioner may not maintain a *qui tam* action but no because the claims were "clearly frivolous, clearly vexatious or brought primarily for purposes of harassment". In other claims, subsequent alleged violation by petitioner of Rule 16(f), or Rules 37 and 41(b), Fed. R. Civ. P., and 42 U.S.C. § 1988 have no relevance to the "summary judgment".

SUMMARY JUDGMENT ON BASIS OF STATUTE OF LIMITATION

On May 14, 1986, District court granted summary judgments in favor of 19 Defendants, while petitioner asserted that:

"[u]nder both Colorado and federal law the limitation period is tolled until the aggrieved party learns of the fraud or should have discovered it by exercise of reasonable diligence". *Noland v. Garley*, 566 F. Supp. 210 (D. Colo. 1983) quoting from *Hackbert v. Holmes*, 675 F. 2d 1114, 1120 (10th Cir, 1982) and *Aldrich v. McCulloch Properties Inc.*, 627 F. 2d 1036 (10th Cir. 1980).

The disputed material facts are for the jury.

The court of Appeals' judgment on the first appeal is that "district Court's dismissal of this action with prejudice and award of attorney's fees and costs was within its limits of discretion", certainly does not cover the summary judgments, since the review is *de novo.*

"*The trial court has no real discretion in determining to grant summary judgment...* [Appellate Courts] do not examine the trial court's rulings under the 'clearly erroneous' standards of Rule 52, F.R. Civ. P., but apply the strict standards of Rule 56". *Luckett v. Bethlehem Steel Corp.*, 618 F2d 1373, 1377, (10th Cir. 1980). Emphasis added. Thus the review of the summary judgments was not conducted on the first appeal. Therefore, it should have been conducted on the second appeal.

Dismissal of Civil Right Claims

On second appeal, the Court of Appeals adjudged that:

> On appeal, plaintiff first argues the district court erred by determining the amount of attorney's fees pursuant to 42 U.S.C. Section 1988, rather than pursuant to Fed. R. Civ. P. 37. We need not address the nuances of Section 1988.
> Because the standards for awarding attorney's fees under Section 1988 and Rule 37 are essentially the same, we can uphold the district court's award of attorney's fees pursuant to rule 37.

Petitioner did not confess that respondents are entitled to attorney's fees under any statute. His first position is that District court abused its discretion in dismissing the claims under Rule 37 for failure to comply with impossible orders. *Societe Internationale v. Rogers*, 357 U.S. 197, 212 (1958); *National Hockey League v. Metropolitan Hockey Club, Inc.*, 427 U.S. 639, 640 (1976).

Davis v. City of Charleston, MO, 827 F2d 317 (8th Cir., 1987) held that Defendant police officers were not entitled to attorney's fees under 42 U.S.C. § 1988 in civil rights action brought by arrestee claiming she was unlawfully arrested, where due to dismissal of action upon counsel's failure to appear on *fifth* trial set, arrestee was not given opportunity to submit affidavits or evidence to show her claims

were conceivably of merit, so that from the record the court could not say that arrestee could not have established colorable claim. *Davis* at 322-3.

Here, District Court refused to reset the trial date *even once.*

Reconstructed Application for Attorney's Fees and Costs

Counsel Ted Ayres in his affidavit admits that he reconstructed the hours and had no contemporaneous record. It is unacceptable under the circuit law, *Ramos v. Lamm,* 713 F2d 546 (10th Cir. 1983) and Local District Court Rule 105(A). See p.32a *infra.*

Untimely F. R. Civ. P. 59(e) Motion and Violation of 18 U.S.C. 1623, False Declaration Before Court

In the order of February 9, 1988, trial court, *sua sponte,* accepted counsel Tharp's untimely Rule 59 (e) Motion, amended application for his fees, as Motion under Rule 60(b)(1) and/or Rule 60(b)(6) to set aside the judgment of October 14, 1986, which denied in its entirety all his fees since Defendants' counsel, subscribed, under oath, to at least 22 falsehoods. No court has ever held that such behavior justifies relief under Rule 60 (b)(1) and/or Rule 60(b)(6).

On September 15, 1988, the Court of Appeals denied the motion and the petition for rehearing. P1a. *infra.*

REASONS FOR GRANTING THE WRIT

I

The federal appeals court sanctioned the federal district court's refusal to permit the maintenance of an action under Federal False Claims Act which the district court had adjudged to be meritorious and this contravened the law and federal policy to stimulate private action to protect the government against fraud.

The False Claims Act was adopted in 1863 and signed into law by President Abraham Lincoln in order to combat rampant fraud in Civil War defense contracts by providing incentives for private actions. Senate report on False Claims Amendment of 1986, notes that:

> The proposed legislation seeks not only to provide the Government's law enforcers with more effective tools, but to *encourage any individual knowing of Government fraud to bring that information forward.* In face of sophisticated and widespread fraud, *the committee believes only a coordinated effort of both the government and citizenry will decrease this wave of defrauding public funds.* Emphasis added. 1986 U.S. Code Cong. and Administrative News, p. 5266.

Respondents defrauded the federal government as well as the petitioner.

The district court adjudged that unlicensed petitioner's pro se action under False Claims Act was meritorious and should be maintained. It later reversed itself and granted "summary judgment" for respondents since an unlicensed *pro se* petitioner may not maintain a *qui tam* action. It refused to separate the claim and have a licensed attorney enter an appearance on behalf of petitioner, which manifestly contravened the law and federal policy to stimulate private action. The federal court of appeals improvidently affirmed the clearly erroneous judgment of the district court.

II

The federal appeals court sanctioned the district court's award of attorney's fees and costs against an informer in a meritorious action under Federal False Claims Act which contravenes the law and federal policy that an informer or "whistle blower" is to be protected and rewarded but not punished.

Respondents incurred almost all of their expenses and attorney's fees for defense of claims under False Claims Act. They are not entitled to fees and expenses under the relevant statute, 31 U.S.C. § (d)(3), since "summary judgment" was granted because unlicensed *pro se* petitioner may not maintain a *qui tam* action but not because the claims were "clearly frivolous, clearly vexatious, or brought primarily for purposes of harassment." In other claims, subsequent alleged violation by petitioner of Rules 37 and 41(b), Fed. R. Civ. P., and 42 U.S.C. § 1988 have no relevance to the "summary judgment". The federal policy is to encourage, reward and protect an informer or

"whistle blower" who brings a meritorious action under False Claim Act. The policy is now codified in 31 U.S.C. § 3731 see in particular parts (c), (d), (g), and (h) of the section. Instead, the district court punished petitioner by imposing heavy costs and attorney's fees on him. It contravened the law and federal policy to protect and reward an informer who brings a meritorious action under False Claims Act. The federal court of appeals improvidently affirmed the district court's clearly erroneous award of attorney's fees and cost for respondents' defense of a meritorious action under False Claims Act.

III

The federal appeals court sanctioned the federal district court's extreme departure from accepted and usual course of judicial proceedings.

Petitioner's diligent search has not uncovered any reported case where a federal district court had for 4 years repeatedly ordered completion of all discovery, preparation of pretrial order, set deadlines for pretrial matters and a date for trial to jury, even before respondents had answered the complaint and then dismissed the action for petitioner's failure to complete all discovery in the six weeks allowed from the time respondents answered the complaint.

District Court cited petitioner's failure to complete all discovery, even before respondents had answered the complaint, as a reason for its dismissal of the action. "The Court ordered that *all* discovery be completed by September 30, 1983. Unfortunately, this deadline was extended." Emphasis in the original. Order dismissing the action, p. 13a, *infra*. Furthermore, the facts recited in the Order are not supported by the record, for example, the Order speaks of a "four (4) hour discovery conference on January 14, 1985," p. 13a, *infra*. In fact, the conference lasted for a few minutes. It should be noted that petitioner received respondents' answer to the complaint on February 27, 1986.

During these 4 years respondents retaliated against petitioner. They dismantled petitioner's research experiments and prevented him from teaching any course, in spite of his tenured professorship. He moved for temporary restraining order and preliminary injunction. For years district court refused to rule on these motions and then

dismissed them since it was waste of judicial resources to consider temporary relief. Petitioner sought relief which would permit him to pursue his academic work. Instead, District Court added to petitioner's injury by compelling him to abandon his research presentation in Tucson, Arizona and appear next day for a hearing in Oklahoma City in spite of petitioner's strenuous objection and this violated Rule 77(b), "no hearing, other than one ex parte, shall be conducted outside the district without the consent of all parties affected thereby."

Respondents' actionable conduct continues. Such departure from accepted and usual course of judicial proceedings and violation of rules is manifestly unjust and burdensome for a petitioner and is waste of judicial resources, and violates Fed. R. Civ. P., Rule 1, that the rules "shall be construed to secure the just, speedy, and inexpensive determination of every action."

The right of access to the courts is assured by the First Amendment. In addition, the congressional mandate embodied in 28 U.S.C. §1654 is that in all courts of the United States the parties may plead and conduct their own cases. District Court by convolution of procedure has extinguished petitioner's constitutional and statutory rights of this access.

IV.

A federal appeals court denies meaningful review when (a) it affirms summary judgments on some claims with the declaration that the district court was within its limits of discretion and (b) refuses to consider that dismissal of other claims violated the appeals court's standards for dismissal.

(a)

District Court granted summary judgments in favor of some of the respondents on some of the claims. Subsequently, it dismissed other claims for alleged failure to complete discovery. District Court had fully discharged its function relative to the claims on which it granted summary judgments. The Appeals Court should have reviewed the grant of summary judgments using the criteria for review of such

judgments but not by a declaration that District Court was within its limits of discretion.

The court in *Luckett v. Bethelhem Steel Corp*, 618 F. 2d 1373, 1377, (10th Cir. 1980) held that:

Moreover, the appellate court considers a summary judgment in the same manner as the trial court since *the trial court has no real discretion in determining to grant summary judgment.* 6 Moore's Federal Practice paragraph 56-23, p. 56-1394; see *Radobenko v. Automated Equipment Corp.*, 520 F.2d 540, 543 (9th Cir. 1975). We do not examine the trial court's rulings under the "clearly erroneous" standard of Rule 52, F.R. Civ.P., but instead apply the strict standard of Rule 56. *Exnicious v. United States*, 563 F.2d 418, 423 n.9 (10th Cir. 1977); *National Aviation Underwriters v. Altus Flying Service, Inc.*, 555 F.2d 778, 781 n.6 (10th Cir. 1977). Emphasis added.

(b)

The Tenth Circuit has set standards which a district court shall follow in dismissing an action. See *In re Baker*, 744 F.2d 1438 (10th Cir. 1984) and *Woodmore v. Git-N-Go*, 790 F-2d 1497 (10th Cir. 1986). In particular *Woodmore* at 1499 states:

"We hold that, when a case is dismissed with prejudice or dismissed without prejudice at a time when the statute of limitation would ban refiling, a trial court must explain why it imposed the extreme sanction of dismissal."

District Court's long order, p. 9a, *infra*, essentially states two reasons for the dismissal with prejudice: (1) extension of discovery deadlines would have further prolonged the case, and (2) petitioner's conduct was vexatious and contumacious. However, the record shows that for 4 years District Court refused to rule on respondents' motions to dismiss and/or summary judgment. Petitioner was most obedient servant of the court. For example, he prepared a "pretrial order" even though respondent had not even answered the complaint; and forsook his research presentation in Tucson, Arizona and appeared next day for an out-of-district hearing in Oklahoma City, when he knew that the court's order was in violation of the rules.

Prior to the dismissal, District Court never applied any sanctions against petitioner. It did apply sanctions against counsel for respon-

dents since he was resident of Colorado, was not a member of Colorado Bar, was practicing before District Court and this violated local rules of the District. The court awarded petitioner his costs for the deposition which was aborted because counsel for respondents was in violation of the local rule.

V

The decisions of the Tenth and Eight Circuits are in conflict on award of attorney's fees to respondents under 42 U.S.C. § 1988 when a civil rights claim is dismissed for failure to proceed to trial and petitioner was not given an opportunity to present evidence to show that his claims were conceivably meritorious.

The Eight Circuit in *Davis v. City of Charleston, MO*, 827 F.2d 317 (1987) ruled that Defendant Police officers were not entitled to attorney's fees under 42 U.S.C. § 1988 in civil rights action brought by arrestee claiming she was unlawfully arrested, where due to dismissal of action upon counsel's failure to appear at *fifth* trial set, arrestee was not given opportunity to submit affidavit or evidence to show her claims were conceivably of merit, so that from the record the court could no say that arrestee could not have established colorable claim. *Davis* at 322-3.

In the instance case, the district court dismissed the civil right claims for failure to complete discovery and proceed to trial and refused to reset the trial even *once*. It then declared that petitioner would have to pay respondents unspecified costs and attorney's fees for defense of all claims, including those on which summary judgments had been earlier granted, without stating the statute or rule under which costs and fees were awarded.

The Tenth Circuit first affirmed the award of unspecified costs and fees under unspecified statute or rule. The district court subsequently ruled that it awarded the fees under 42 U.S.C. § 1988, and reduced the costs and fees to a sum certain. Petitioner objected on various grounds as stated herein above. The Tenth Circuit then adjudged that: We need not address the nuances of § 1988. Because the standards for awarding attorney's fees under § 1988 and Rule 37 are essential-

ly the same, we can uphold the district court's award of attorney's fees pursuant to Rule 37. P. 3a infra.

The judgment is clearly improvident. It affirms the district court's judgment which awarded respondents their costs and attorney fees for the defense of civil rights claims as well as for other claims such as defense of meritorious claims under False Claims Act for which "summary judgment" was entered for defendants and which have no relation to § 1988 nor to Rule 37.

In any case, conflict remains between the decisions of 8th and 10th circuits on the issue of award of attorney's fees and expenses to respondents when petitioner's civil rights claims are dismissed for failure to proceed to trial and the petitioner was not given an opportunity to submit evidence to show that his claims were conceivably meritorious.

This court should resolve the conflict in light of the congressional policy that a civil rights petitioner vindicates his own rights as well as appears as "private attorney general" to vindicate a public policy considered to be of the highest priority.

CONCLUSION

For these various reasons, this petition for certiorari should be granted.

Respectfully submitted,

MAHINDER S. UBEROI, *pro se*
819 Sixth Street
Boulder, CO 80302
(303) 442-2879

January 6, 1989

APPENDIX

UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

NO. 87-2219 September 15, 1988

Before Honorable William J. Holloway, Jr., Chief Judge, Honorable James E. Barrett, Honorable Monroe G. McKay, Honorable James K. Logan, Honorable Stephen H. Anderson, Honorable Deanell Reece Tacha, Honorable Bobby R. Baldock, Honorable Wade Brorby, Honorable David M. Ebel, Circuit Judges, United States Court of Appeals, and Honorable Thomas R. Brett, District Judge, United States District Court for the Northern District of Oklahoma.*

MAHINDER S. UBEROI, Plaintiff-Appellant,

v.

University of Colorado, an institution of State of Colorado; JACK K. ANDERSON; PETER C. DIETZE; BYRON L. JOHNSON; SANDY F. KRAEMER; RACHEL B. NOEL; ROY H. SHORE; DAVID K. SUNDERLAND, Regents of University of Colorado; GERALDINE BEAN; LOUIS BEIN; JIM R. CARRIGAN, Honorable; THOMAS S. MOON; ERIC W. SCHMIDT, former Regents of University of Colorado; ARNOLD R. WEBER, President of University of Colorado; ROLAND C. RAUTENSTRAUS, former President of University of Colorado; THEODORE C. VOLSKY, Vice President of University of Colorado; HARRISON SHULL, Chancellor of University of Colorado, Boulder; J. RUSSELL NELSON; LAWSON CROWE, former Chancellors of University of Colorado, Boulder; MILTON E. LIPETZ, Vice Chancellor of University of Colorado, Boulder; JAMES N. CORBRIDGE, JR., former Vice Chancellor of University of Colorado, Boulder; ALFRED R. SEABASS, Dean of Engineering College of University of Colorado; MAX S. PETERS; WILLIAM J. PIETENPOL; FRANK S. BARNES, former Deans of Engineering College of University of Colorado; KLAUS D. TIMMERHAUS; GEORGE J. MALER, As-

sociate Deans of Engineering College of University of Colorado; GEORGE R. INGER, Chairman, Aerospace Department of University of Colorado; FRANK ESSENBURG; LOUIS C. GARBY, former Chairmen Aerospace Department of University of Colorado; JAMES D. FOCH PETER FREYMUTH; DONALD KENNEDY; MARVIN LUTTGES; HOWARD SNYDER, faculty members of Aerospace Department of University of Colorado; C. FORBES DEWEY; THOMAS G. JONES; LUDWIG OSTER; GEORGE C VLASES; RICHARD S. BUCY; JOSHUA MENKES, former faculty members of Aerospace Department of University of Colorado; WOLFGANG BANK; RUSSELL MEINZER, staff members, Aerospace Department of University of Colorado; DAVID R KASSOY, faculty member of Mechanical Engineering Department of University of Colorado; WILMAR F. BERNTHAL; FRANZ MOHLING; JONATHON B. CHASE, former Chairmen of Privilege and Tenure Committee of University of Colorado; PETER BECKMANN; LEONARD G. BOONIN; LAWRENCE D COOLIDGE; JAMES P. FRANK; EUGENE S. GOLLIN; DOROTHY GREGG; CHARLES A. KENEVAN; PHYLLIS B. KENEVAN; JOSEPH LAZAR; PHILLIP I. MITTERLING; MELVIN NEWMAN; PETER N. SIMON; GILBERT WHITE; JAMES D. WOLF; JAMES R. WAILES, former members of Privilege and Tenure Committee of University of Colorado,Defendants-Appellees.

This matter is before the court on appellant's petition of rehearing with suggestion for rehearing en banc. The materials submitted by appellant have been reviewed by the members of the hearing panel, who conclude that the original disposition was correct. Accordingly, the petition is denied on the merits. The petition having been denied on the merits by the panel to whom the case was submitted and no member of the panel or judge in regular active service on the court having requested that the court be polled, the suggestion for rehearing en banc is denied. Appellant's "motion to consider some questions of jurisdiction, for designation of additional record on appeal, for leave to file supplemental brief, and for any necessary suspension of rules" is denied as moot.

Robert L. Hoecker, Clerk By Patrick Fisher, Chief Deputy Clerk

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UNITED STATE COURT OF APPEALS FOR THE TENTH CIRCUIT

No. 87-2219, Order Filed July 6, 1988
MAHINDER S. UBEROI, Plaintiff-Appellant,

v.

UNIVERSITY OF COLORADO, et al., Defendants-Appellees.

Order and Judgment

Before Logan and Barrett, Circuit Judges, and Brett, District Judge.*

*The Honorable Thomas R. Brett, Unites States District Judge for the Northern District of Oklahoma, sitting by designation.

After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of this appeal. See Fed. R. App. P. 34(a); 10th Cir. R. 34.1.8 The cause is therefore ordered submitted without oral argument. Plaintiff appeals from orders of the district court awarding defendants attorney's fees in the amount of $74,886 and costs in the amount of $4,202.49. On appeal, plaintiff first argues the district court erred by determining the amount of attorney's fees pursuant to 42 U.S.C. § 1988, rather than pursuant to Fed. R. Civ. P. 37. We need not address the nuances of § 1988. Because the standards for awarding attorney's fees under § 1988 and Rule 37 are essentially the same, we can uphold the district court's award of attorney's fees pursuant to Rule 37. Nonetheless, after reviewing the briefs and record on appeal, we conclude the amount of the district court's award of attorney's fees and costs was reasonable and appropriate. We further conclude that plaintiff's arguments, that (1) he should receive costs

and attorney's fees for defendants' violations of Fed. R. Civ. P. 11; (2) the district court should not have used prevailing rates to calculate attorney's fees; (3) defendants did not submit acceptable records regarding their hours; (4) defendants should not be awarded costs for depositions and counsel's travel to Oklahoma; and (5) defendants' amended application for attorney's fees was an untimely Fed. R. Civ. P. 59(e) motion which should not have been accepted by the district court, are without merit. Plaintiff raises several other issues on appeal. We need not address those issues, because they were previously raised and ruled on by this court in *Uberoi v. University of Colorado*, Unpublished No. 86-2186 (10th Cir. filed July 7, 1987). See *A.V. Constantini v. Civil Aeronautics Bd.*, 706 F.2d 1025, 1026 (9th Cir. 1983). Plaintiff's request for oral argument is denied. Defendants' request for attorney's fees and double costs on appeal is denied. The judgment of the United States District Court for the District of Colorado is Affirmed. The mandate shall issue forthwith.
ENTERED FOR THE COURT PER CURIAM

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

No. 82-LW-806
MAHINDER S. UBEROI, Plaintiff,

vs

UNIVERSITY OF COLORADO, et al., Defendants.

ORDER

The matter before the Court is the determination of the amount of attorneys' fees to be granted to the Defendants, the University of Colorado, et al. (University). Entitlement to such fees having been determined in previous orders, the Court held an evidentiary hearing in Denver on March 5, 1987 on the amount for which the Defendants would be recompensed. In its review, the Court considers the evidence presented at the hearing, the supplemental motion of the

Plaintiff, Mahinder S. Uberoi (Uberoi), and the Court's knowledge of the nature and duration of this action. Before addressing the evidence presented on March 5, a brief history of the litigation provides the framework for the Court's review. The action began on May 20, 1982, when Uberoi, a pro se plaintiff, filed the ninety-nine page complaint in the United States District Court, Denver, Colorado. The Defendants ultimately included the University regents, officers, and faculty. Because of unresolvable procedural problems during the management of the action, the case was transferred to this Court. The protracted nature of the case involved some fifty-three distinct motions or applications by the Plaintiff Uberoi. The Defendants responded to these actions and filed approximately twenty-four distinct motions or applications. The Plaintiff's complaint was dismissed with prejudice after the Court found that Uberoi's persistent noncompliance with the Federal Rules of Civil Procedure had forced the Defendants to spend an inordinate amount of time responding to frivolous and harassing motions and appeals. See Order of June 16, 1985; Rules 16, 37 and 41(b), Fed. R. Civ. P. Pursuant to the Court's direction, the Defendants filed for attorney's fees. The Court found that University was entitled to such fees. See Orders of October 14, 1986 and February 9, 1987. The evidentiary hearing considered the following University requests:

Ted Ayres;	
University of Colorado	303 hours @ $125.....$37,875.00
Rosemary Augustine, Associate	10 hours @ $90.....900.00
Richard A. Tharp; Martin, Knapple,	
Humphrey & Tharp	206.7 hours @ $100.....20,670.00
	73.2 hours @ $125.....9,150.00
Roxanne Jensen, Associate	15 hours @ $90.....1,350.00
Andrew Michael Gaydosh,	
Associate	59.4 hours @ $90.....4,941.00
	TOTAL $74,886.00

As directed by the Court, the Defendants produced for the March 5 hearing an attorney with requisite independence, knowledge and experience who could testify as to the prevailing rates for attorney's fees in the Denver area. Robert F. Hill (Hill) began working in

Colorado in 1974 after judicial, private firm, and Neighborhood Legal Services clerkship and litigator experience. His Colorado professional experience includes teaching at the University at Colorado School of Law; serving as First Assistant Attorney General for the Antitrust Section of the State of Colorado and affiliation as a partner in a Denver law firm. Hill testified that his knowledge relating to Denver area fees was derived from: the practices of the firm in which he is a partner; experience as co-counsel with attorneys from other firms; experience in class action litigation and post judgment applications for fees; his firm's representation of city and state agencies which requires competitive bidding processes and knowledge of other firms' fees; and collegial information sharing. Because of these professional experiences, Hill estimated that he had personal contact with approximately twenty to thirty law firms in the Denver area. In reviewing the particulars of this action, Hill testified that he studied the complaint, docket sheet, certain proceedings, the more recent orders of the Court, and the resumes of all attorneys for whom fees were requested. Based upon this information, Hill stated that the fee range, for the time period in question, for lead attorneys of the experience and expertise of Richard A. Tharp (Tharp) and Ted D. Ayres (Ayres) was $125.00 to $175.00 per hour. Hill further stated that or at least 200 hours of the number for attorney Tharp were below the range and approximately seventy-three were at the bottom of this range. Given the complexity of the case and the specialized skill of Tharp and Ayres in academically related litigation, Hill concluded that $125.00 per hour was a reasonable rate, in fact, at the low end of reasonable for attorneys of comparable experience and skill in the Denver area. With regard to the rate for associates, hill stated that the range was $60.00 to $100.00 per hour, depending on the attorney's experience prior to and after law school graduation and the attorney's law school academic record. In this instance, the credentials of the three associate attorneys Augustine, Jensen, and Gaydosh were such that $90.00 per hour was a reasonable fee. The three had qualifications for the top level of the range at the time period when they performed services. The Plaintiff Uberoi testified that his personal experience in consulting attorneys in the Denver area revealed a range for attorneys of $60.00 to $100.00 per hour. As the Court understood his tes-

timony, Uberoi stated specifically, attorneys with ten years of experience, somewhat comparable to Tharp and Ayres, charged $50.00 to $75.00 per hour. Associates doing legal research, akin to Augustine, Jensen, and Gaydosh, would be compensated at $30.00 per hour. See also Supplemental Motions for Consideration of Factors which Reduce Attorney Fees, filed by the Plaintiff on March 5, 1987. Based on the evidence, the Court finds that the Defendants have demonstrated that their request is a reasonable amount for attorney's fees and that Defendants should be awarded $74,886.00. In reaching this conclusion the Court has considered: the extensiveness of the work required in the four plus years of litigation; that Defendants, in compliance with the Court's order, reduced their initial request through exclusion of duplicative services and services provided through the retainer fee which Tharp regularly received from the University; and that the University used a conservative approach in calculating the total of hours by not requesting fees unless there existed a document contemporaneously with each effort made. Through the University's efforts the fee requested was limited only to fees incurred in the action in this court and reduced from the initial sum requested of $103,377.00 to the $74,886.00. The award of these fees accords with the guidance from the Tenth Circuit court of appeals in *Ramos v. Lamm*, 713 F.2d 546 (10th Cir. 1983) that a reasonable fee is the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate. Id., at 552 quoting *Hensley v. Eckerhart*, 461 U.S. 424, 433; 103 S.Ct. 1933, 1939; 76 L.Ed. 2d 40, 50 (1983). The Court has considered the time allocated to specific tasks, reasonableness of the hourly rates, appropriate reduction of fees, and appropriate compensation for law clerks. Based on the foregoing, the Defendants' Request for Attorneys' Feed in the amount of $74,886.00 is hereby granted. April, 12th 1987.
LEE R. WEST, UNITED STATES DISTRICT JUDGE

UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

No. 86-2186. Order Filed July 7, 1987

MAHINDER S. UBEROI, Plaintiff-Appellant,

v.

UNIVERSITY OF COLORADO, et al, Defendants-Appellees.

Order and Judgment

Before LOGAN and TACHA, Circuit Judges, and O'CONNOR, District Judge.*

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*The Honorable Earl E. O'Connor, Chief Judge, United States District Court for the District of Kansas, sitting by designation.

After examining the briefs and the appellate record, this three-judge panel has determined unanimously that oral argument would not be of material assistance in the determination of this appeal. *See* Fed. R. App. P. 34(a); 10th Cir. R. 34.1.8(c) and 27.1.2. The cause is therefore ordered submitted without oral argument.

This is an appeal from an order of the district court dismissing plaintiff's action with prejudice for failure to comply with district court orders, *see* Fed. R. Civ. P. 16, and awarding defendants' costs and attorney's fees.

On appeal, plaintiff argues the district court erred (1) by dismissing plaintiff's action with prejudice; (2) in three times ordering plaintiff to file a pretrial order even though no answer had been filed; (3) in determining plaintiff's behavior was contumacious; (4) in establishing discovery deadlines; (5) by setting a trial date before defendants answered the complaint; (6) by refusing to permit plaintiff to assert the rights of nonparties; (7) by refusing to permit an attorney to make a special appearance for plaintiff without being an attorney of record; (8) in denying plaintiff's motions for a temporary restraining order and preliminary injunction; (9) by determining the statute of limitations had run for some of plaintiff's claims; (10) by granting attorney's fees to defendants; (11) by restricting plaintiff from filing

motions for reconsideration; (12) by not recusing sooner; (13) by denying plaintiff's motions for sanctions; (14) by failing to certify all of its orders pursuant to Fed. R. Civ. P. 54(b); and (15) by refusing to hear anything *de novo* after transfer. Plaintiff also claims the district court was biased.

After reviewing the entire record and briefs on appeal, we conclude the district court was not biased. Furthermore, we conclude that the district court's dismissal of this action with prejudice and award of attorney's fees and costs to defendants was within the limits of its discretion. Because the dismissal and award of attorney's fees and costs were appropriate, we need not address plaintiff's other arguments on appeal. We DENY plaintiff's request for oral argument.

The judgment of the United States District Court for the District of Colorado is AFFIRMED.

The mandate shall issue forthwith.

ENTERED FOR THE COURT PER CURIAM

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

No. 82-LW-806

MAHINDER S. UBEROI Plaintiff,

vs.

UNIVERSITY OF COLORADO, et al., Defendants.

ORDER

NOW, on this 28th day of May, 1986, after having considered oral argument by the parties upon defendants' motion under Rule 16(f) of the Federal Rules of Civil Procedure, this Court finds that this matter should be dismissed with prejudice.

This Court finds that plaintiff pro se's case should be dismissed with prejudice because plaintiff pro se's contumacious conduct throughout the pendency of this case demonstrates vexatious and dilatory intent. Plaintiff pro se has sabotaged this Court's manage-

ment of the preparation of this case for trial and thereby violated the spirit, intent and purpose of Rule 16 of the Federal Rules of Civil Procedure. He has failed to make or cooperate in discovery. Therefore, he is subject to the sanctions provided for by Rule 37 of the Federal Rules of Civil Procedure. He has also failed to comply with the Federal Rules and the orders of this Court. Thus, his case is also subject to dismissal pursuant to Rule 41(b) of the Federal Rules of Civil Procedure. *See Stanley v. Continental Oil Co.*, 536 F.2d 914, 917 (10th Cir. 1976) (court has inherent authority to dismiss for failure to prosecute).

The motion before the Court is primarily based upon defendants' contention that this case should be dismissed because plaintiff pro se has failed to comply with the orders of this Court, and therefore has violated Rule 16. Rule 16 focuses

> "on the mechanics of pretrial conferences and scheduling. The purpose of Rule 16 is to insure early judicial intervention in the process of trial preparation and proper conduct of that entire process. When viewed in its broad remedial context, subsection (e) contemplates its application to all pretrial management orders. Certainly the sanctions concept contained in subsection (f) is a codification of the purpose to insist that the court, the lawyers and the parties abandon habits which unreasonably delay and otherwise interfere with the expeditious management of trial preparation. . . we are dealing with the matter most critical to the court itself: management of its docket and avoidance of unnecessary burdens on the tax-supported courts, opposing parties or both. The primary purpose of sanctions in this context is to insure reasonable management requirements for case preparation. The secondary purpose is to compensate opposing parties for inconvenience and expense incurred because of any noncompliance with the reasonable management orders of the Court."

Matters of Sanctions of Baker, 744 F.2d 1438, 1441 (10th Cir. 1984). Defendants filed their Rule 16 motion primarily in response to plaintiff pro se's failure to comply with this Court's Order that the parties submit their list of witnesses and exhibits on or before April 1, 1986.

It is undisputed that plaintiff pro se did not file a list of witnesses or exhibits on April 1, 1986, as ordered by the Court. In a motion file stamped on April 7, 1986, six days late, plaintiff pro se moved this Court to postpone all dates previously established in this case until the Court ruled upon plaintiff pro se's pending motions and discovery "proceeded to an extent to permit at least some simplification of issues." Plaintiff pro se's Motion for Extension of Time, file stamped April 7, 1986. The only excuse plaintiff pro se offered for his failure to comply with this Court's Order that he submit his list of witnesses and exhibits on April 1, 1986, and discovery be completed by April 15, 1986, was his opinion that the case was not "in a state to permit plaintiff to submit his list of witnesses and exhibits." *Id.* This is but one example of the contumacious conduct plaintiff pro se has exhibited throughout the history of this case. A review of the history of this case highlights plaintiff pro se's vexatious intent to delay a decision on the merits of his claims and thereby harass defendants.

Plaintiff pro se is a male of East Indian origin and a naturalized citizen and resident of the United States and the State of Colorado. He is currently a professor at the University of Colorado, formerly a three-term Chairman of the Department of Aerospace Engineering Sciences. In his initial complaint he claimed the University, its Board of Regents and sixty-some individuals in their official and individual capacities had engaged in a racially motivated conspiracy against him, abused governmental power to violate his civil rights and those of his associates and students; violated his rights under his contract as a tenured professor; and, violated his rights associated with his research grants and contracts with the United States Government. As relief, plaintiff pro se seeks compensatory damages in the amount of $500,000.00 and punitive damages in the amount of $2,000,000.00 against each individual defendant; a declaratory judgment that plaintiff pro se's rights were violated; compensation for lost and/or unjust wages; and an injunction ordering defendants to institute non-discriminatory and safe policies, practices and customs, institute non-discriminatory allocation of space, staff and physical facilities, restore him to a productive academic position and desist from unlawful practices. His complaint against over sixty (60) defendants was ninety-

nine (99) pages long and consisted of two-hundred ninety-two (292) separately numbered paragraphs. It was filed on May 20, 1982.

Almost four (4) years ago, on October 20, 1982, the Court issued an order requiring the parties to appear for a discovery conference on November 23, 1982, and be prepared to discuss a proposed plan and schedule of discovery and set limitations on discovery. At that discovery hearing plaintiff pro se was advised that the Judge knew some of the defendants. Nevertheless, plaintiff pro se advised the Court that he did not intend to disqualify the Judge. A position upon which he later changed his mind. In addition, the Court advised the parties that in order to expedite and organize discovery, Magistrate Donald E. Abrams would be assigned to the case for the purposes of developing a discovery plan, simplifying the issues and resolving discovery disputes.

The Magistrate set the case for discovery conference on December 9, 1982. At that discovery conference plaintiff pro se was ordered to submit on or before December 30, 1982, an outline of his desired discovery. At this point, the parties began depositions and paper discovery. Plaintiff pro se also began what later became a pattern of requesting reconsideration of every motion of his that was denied. *See* Plaintiff pro se's Motion to Decrease Response Time under Rules 26 and 27 and to Require Access to Records, filed January 3, 1983; Order, dated January 24, 1983; Motion to Reconsider, filed February 7, 1983.

During this period of discovery, plaintiff pro se repeatedly exhibited his stubborn refusal to attempt to resolve discovery disputes in good faith. For example, plaintiff pro se moved for sanctions against defendants because at plaintiff pro se's deposition on February 9, 1983, defendants' attorney wanted to continue plaintiff pro se's deposition through lunch and order in sandwiches since he had a plane to catch at 2:30 p.m. *See* Affidavit of Barbara J. Dahl, dated May 4, 1983. Plaintiff pro se objected to this stating he preferred to have his own food and a break of at least an hour. *Id.* Defendants' attorney said it would not make sense to recommence, so the deposition was adjourned until another convenient time. *Id.* Despite plaintiff pro se's statement that that was fine, he moved for

sanctions because the deposition was adjourned. *See* Motion to Compel and Sanctions under FRCP 37, filed May 27, 1983.

Rather than finding defendants' attorney at fault, the Magistrate found plaintiff pro se's answers to the questions at his deposition were "vague and unresponsive, which caused the deposition to be extended [and that his] refusal to permit the deposition to proceed through the lunch hour prevented any further meaningful discovery prior to the attorney for the defendants leaving for a plane." Order, filed August 3, 1983. This decision was appealed. As it appeared such disputes would continue, the Court ordered all depositions to be taken at the courthouse, so disputes could be immediately refereed. Order, filed June 27, 1983. Nevertheless, plaintiff pro se objected to the Court's attempt to expedite discovery disputes because plaintiff pro se felt it was inconvenient to have the depositions at the courthouse.

The Court ordered that *all* discovery be completed by September 30, 1983. Unfortunately, this deadline was extended. More discovery disputes followed. Plaintiff pro se wanted defendants to develop computer programs to analyze accounting data that he wanted to have to support his claims and moved for sanctions because defendants had refused to do so. *See* Motion for Sanctions, July 26, 1984. This motion was denied because defendants need not create special programs to develop plaintiff pro se's case for him. *See* Order, August 9, 1984. Plaintiff pro se appealed the Magistrate's denial of his request. *See* Appeal filed October 15, 1984. The Court again denied his request and plaintiff pro se moved to reconsider this denial twice again. *See* Order, April 10, 1986.

After a four (4) hour discovery conference on January 14, 1985, Magistrate Abrams ordered that all depositions be supervised by him and that prior to any deposition he be supplied with a summary of the issues upon which the deponent would be questioned. Plaintiff pro se at this point requested that the Court order defendants' counsel to comply with the Federal Rules of Civil Procedure simply because defendants' counsel objected to a question in a deposition on the grounds that it was a leading question. Regardless of whether counsel's objection was improvident, this Court finds plaintiff pro se's frivolous motion a clear example of plaintiff pro se's failure to attempt in good faith to resolve discovery disputes. Moreover, this

Court finds such a motion is nothing more than an attempt to harass defendants and their counsel. Plaintiff pro se's outrageous requests also include his demand that he be privy to written communications between Magistrate Abrams and Judge Matsch, if such communications referenced his case.

One of the clearest examples of plaintiff pro se's vexatious conduct in this matter arises from his motion to sanction defendants' counsel because a defendant smoked during a deposition and put his foot on the table. At the hearing before Magistrate Abrams on this motion, plaintiff pro se's basis for his objection to the deponent smoking was that smoking bothered him and it was reasonable for him not to be exposed to it. *See* Transcript of hearing, February 22, 1985, p. 7, lines 8-12; p. 17, lines 13-17. Furthermore, he objected because it was "impolite." *Id.* at p. 16 lines 17-19. Magistrate Abrams found plaintiff pro se's motion "asinine" and denied it. *Id.* at p. 3, line 21. Plaintiff pro se also appealed the Magistrate's denial of this motion for sanctions. This is but one example of plaintiff pro se's belief that his comfort and convenience are paramount in this case and that the Court is his instrument for obtaining the same at defendants' expense. Plaintiff pro se also moved this Court to sanction defendants because defendants' counsel used the word "damn" during a heated discussion at a deposition. This is another example of plaintiff pro se's attempt to use this Court to control and harass defendants.

All of the above is recited to lay a foundation demonstrating that during the first three years of this case discovery was ongoing and that plaintiff pro se was undaunted in his attempts to consume the time of defendants and this Court with endless and more often than not, frivolous attacks on defendants and their counsel. This is the foundation upon which the Court now reviews plaintiff pro se's assertions that he has not had sufficient time to discover his case and that the case is nowhere near being ready for trial because of this Court's oppressive orders.

Early in this case plaintiff pro se constantly requested that the Court rule on his pending motions and voiced his desire for rapid discovery. *See* Transcript of hearing, July 6, 1984, p. 2, line 22, p. 4, lines 3-11; p. 8, line 25. Yet, he now complains that the Court has hastily ruled upon his motions and that he has not had enough time for discovery.

As early as April 1984, plaintiff pro se advised the Court of his intent to take forty-five (45) depositions of non-party witnesses. *See* Transcript of hearing, July 6, 1984, p. 10, lines 12-18. This Court was advised that close to seventeen (17) depositions were taken during the last week of May 1984 and the month of June 1984. This was after some thirty (30) depositions were to have been taken in February and March of 1984. Nevertheless, plaintiff pro se, on May 8, 1986, more than two years later, has the audacity to represent to this Court and to the Tenth Circuit Court of Appeals that discovery has "hardly begun" and "Judge West's orders have prohibited and/or prevented Uberoi from preparing his case." Response to Defendants' Motion under Rule 16(f), filed May 8, 1986; Petition for Writ of Mandamus and/or Prohibition Pursuant to Rule 21, dated May 23, 1986.

This Court gave plaintiff pro se over six (6) months to complete discovery in a case over three years old, yet he complains that he is still unable to provide a list of witnesses or exhibits. The course of events during the last five months in this case evidence that plaintiff pro se chose to spend his time filing repetitive and often frivolous motions rather than preparing his case for trial by completing discovery. For example, plaintiff pro se three times moved this Court to consider and reconsider its denial of his request to represent the rights of others he stated were either too weak or distant to represent themselves. *See* Order, dated April 8, 1986. He requested this Court to consider and reconsider its denial of his request to amend his complaint for a fourth time, after the deadline date for amendment had past. Plaintiff pro se appealed all of Magistrate Abrams' orders and when his requests were denied a second time he had the effrontery to insist upon de novo hearings upon the same subject matter. *See* Motion, filed April 21, 1986. Plaintiff pro se four times requested that this Court reconsider its rulings upon the application of the statute of limitations and then asked this Court for a more definitive order as to the application of its ruling upon the statute of limitations. *See* Order, dated April 10, 1986.

Many of his complaints are based on inaccurate representations of the facts. For instance, plaintiff pro se complains that the latest discovery deadline of April 15, 1986, was only recently set on February 20, 1986. In fact, the latest discovery deadline of April 15, 1986, was

set during the status conference on November 26, 1985, and memorialized in this Court's Order dated December 4, 1985.

He has on innumerable times attempted to excuse his failure to prosecute his action by stating that he should not have been required to comply with court orders or otherwise proceed with his action until the defendants had answered his complaint, even though defendants' motion to dismiss was pending. This excuse is proffered despite plaintiff pro se's assertion that he "has demonstrated his competence as a pro se litigant" and that he is "diligently following the rules." *See* Response, dated March 27, 1986; Transcript, July 6, 1984, p. 8 lines 2-10.

Plaintiff pro se has an inexhaustible ability to twist what others have said and to take things out of context in order to frustrate and thwart the progress of this case to trial. Of late, he has suddenly claimed that the trial date of June 2, 1986, was set for a summary jury trial. During a telephone conference on February 19, 1986, this Court advised plaintiff pro se that this case was set for trial on June 2, 1986. In addition, the Court advised the parties that a summary jury trial would probably be scheduled in this case sometime between May 15, 1986 and June 2, 1986. Nevertheless, the Court later decided a summary jury trial would be useless in this matter. This Court finds that plaintiff pro se has no reason to believe in good faith that the trial set on June 2, 1986, was a summary jury trial. Even plaintiff pro se has referred to that date as the date of trial. *See* Motion to Reconsider Denial of Extension of Time, filed April 21, 1986.

Each of the events referenced above is not only an example of plaintiff pro se's intent to frustrate this Court's management of this case and his failure to prosecute his case, but also of his failure to comply with the Federal Rules and the orders of this Court. A glaring example of plaintiff pro se's failure to comply with this Court's orders is the document he filed in feigned compliance with this Court's Order that he detail and delineate any action taken on or after May 20, 1986, by certain defendants, who had moved for summary judgment upon the grounds that they had not taken any action against plaintiff pro se within the statute of limitations. Out of an abundance of caution, plaintiff pro se was ordered to make this detailed iden-

tification to ensure that the Court did not dismiss plaintiff pro se's action against any defendant who did engage in some allegedly wrongful conduct within the period of limitations.

Plaintiff pro se responded to the Court's Order by referring the Court to his complaint and by stating that the defendants who had moved for summary judgment included people who he claims comprised a committee and panel that committed wrongful acts within the period of limitations and "they will be more fully identified through discovery." Plaintiff's Compliance with Orders of April 10, 1986, filed April 25, 1986. This statement was made in a document filed ten days after the discovery cutoff date in this action. It demonstrates that even four years after his complaint was filed, plaintiff pro se believes he is still entitled to conduct a fishing expedition to determine who he claims has wronged him. It also is one of many examples of plaintiff pro se's refusal to accept the Court's orders with regard to cutoff dates.

Even after this Court specifically referred plaintiff pro se to Rule 16 and explained that the Pretrial Order controls the trial and subsequent events in a case, plaintiff pro se refused to sign a Pretrial Order he had been ordered to file in this case giving the following reasons:

> "This case is not ready for a pretrial order. At best this document may be considered a status report. It cannot control the subsequent causes of this action pursuant to Rule 16."

Pretrial Order, filed May 27, 1986, p. 27. Plaintiff pro se has repeatedly made it clear that he believes he controls the management and preparation of this case. He has repeatedly insisted that the case proceed in accordance with his wishes, at his convenience and without regard for the Court or opposing parties. He has demanded that a Judge, who will devote his entire efforts and time as well as that of his staff, be assigned to this case. If met, plaintiff pro se's demands would make a mockery of the court system. This Court concludes inevitably that plaintiff pro se has not complied with the Court's orders because he chooses to harass defendants by deliberately forcing them to defend a lawsuit without the benefit of any normal and reasonable safeguards.

Even plaintiff pro se cannot deny that he refused to comply with this Court's Order dated February 20, 1986, wherein the Court clearly stated that the parties must submit their lists of witnesses and exhibits on or before April 1, 1986, by letter to one another and file a copy of the same with the Court. Obviously, plaintiff pro se understood this Order because on April 7, 1986, six days late, he requested an extension of time to file his lists. In his motion for an extension of time, plaintiff pro se asserts "the case is not in a state to set dates for trial and for pretrial matters." He continues by stating the dates set by the Court are prolonging the case and that "time which should have been spent on discovery and simplification of the issues is being spent on responding to oppressive orders." Indulging plaintiff pro se's contumacious conduct, this Court granted plaintiff pro se's request for an extension of time. Granting such an extension prejudiced defendants because plaintiff pro se had the benefit of their list of witnesses and exhibits prior to discovery cutoff, but defendants did not have the benefit of plaintiff pro se's. In fact, plaintiff pro se noticed depositions of four individuals based upon defendants' witness list. It should be noted that plaintiff pro se cancelled these depositions.

Even though plaintiff pro se did not file his lists of witnesses and exhibits on the established date *or the extended date*, he did file (1) a Request for Production under F.R.C.P. 34; (2) Motion to Amend complaint by IV Amendment; (3) Motion for More Definitive Order; (4) Notice to Take Deposition; (5) Motion to Reconsider Denial of Extension of Time; (6) Plaintiff's Offer to Pay Costs; and, (7) Motion for Ab Initio and De Novo hearings. Rather than complying with the Court's orders, it was plaintiff pro se's choice to spend his time on such motions, many of which were attempts to circumvent previous orders of the Court. Alone, the time spent upon his desire to amend his complaint in order to reword a subheading and motion for reconsideration of this Court's denial of his application to do so, evidences a recalcitrant refusal to accept the Court's orders with regard to even minor matters.

Not until May 8, 1986, when plaintiff pro se responded to defendants' motion pursuant to Rule 16(f) did plaintiff pro se even pretend to comply with this Court's Order that he file a list of witnesses and exhibits. In his response, plaintiff pro se merely attached

the face sheets to deposition transcripts and stated the sheets would serve as his list of witnesses. *Cf. Joplin v. Southwestern Bell Telephone Co.*, 671 F.2d 1274 (10th Cir. 1974) (pro se litigant made significant efforts to comply with court's pretrial instructions). The attachments do not comply with this Court's Order. For instance, the attachments do not set out a full list of the names of the witnesses plaintiff pro se intends to call or those he relied upon to establish his claim. The Pretrial Order further demonstrates plaintiff pro se's failure to comply in good faith with this Court's orders and requirement that he prosecute his action within the same restraints and under the same rules as any other party.

Even in the Pretrial Order plaintiff pro se failed to list the names of witnesses he intended to call or those he relied upon to establish his claim. He also failed to set out the nature or substance of the testimony he expected to elicit from any of his witnesses. Plaintiff pro se simply listed as witnesses: "persons impacted by the discriminatory policies of defendants, ... graduate and undergraduate students, ... experts in Plaintiff's field of scholarly and professional activities" and other vague entities. This Court finds plaintiff pro se failed to compose his list of witnesses either to ambush defendants' preparation for trial or because he refuses to comply with the Federal Rules and this Court's orders until he is ready to do so. This Court simply will not allow plaintiff pro se to burden it and defendants with such behavior.

This Court has considered sanctions less severe than dismissal, but has rejected these because any less severe sanction would only prejudice defendants and reward plaintiff pro se for having intentionally delayed this case in order to further harass defendants. Rule 16 of the Federal Rules of Civil Procedure was amended in 1983 to make clear that a court had the power to impose sanctions for failure to comply with scheduling or pretrial orders. Behavior such as that of plaintiff pro se in failing to supply the names of witnesses "has resulted in the dismissal or default of cases." 3 J. Moore, Moore's Federal Prac-

tice, Paragraph 16.14, 16-47, 16-48 (2d ed. 1985). As the Tenth Circuit Court of Appeals has stated, "where directions are clear, the actions obvious, and wholly within the control of the party, there is no reason to expect that the rules or orders should not be followed." *Hollis v. United States*, 744 F.2d 1430, 1432 (10th Cir. 1984). This Court's orders have been clear, plaintiff pro se's refusal to comply with them was wholly within his control.

This Court has repeatedly warned the parties herein, starting in November 1985, that the time for game playing and delay was over. These parties have been repeatedly warned that scheduling dates would not be extended and that this case was set for trial on June 2, 1986. Nevertheless, plaintiff pro se chose to file repetitive motions, rather than discover his case or comply with court orders. Plaintiff pro se has failed to give this Court any reason not to expect that he would comply with court orders. "Somewhere along the line, the rights of the defendant[s] to be free from costly and harassing litigation must be considered. So too must the time and energies of [this Court] and the rights of would be litigants awaiting their turns to have other matters resolved. The exact point on that line is incapable of exact definition," but this Court is satisfied that the present case went beyond it. *Von Poppenheim v. Portland Boxing & Wrestling Comm.*, 442 F.2d 1047, 1054 (9th Cir. 1971), *cert. denied*, 404 U.S. 1039 (1972).

The Court acknowledges that dismissal of an action is a draconian result. Nevertheless, the Court finds it is the only appropriate sanction in view of plaintiff pro se's failure to make and cooperate in discovery and refusal to heed the Court's decisions and comply with court orders. *See National Hockey League v. Metro Hockey Club, Inc.*, 427 U.S. 639, 643 (1976); *Link v. Wabash Railroad Company*, 370 U.S. 626, 629 (1962); *Carter v. City of Memphis, Tenn.*, 636 F.2d 159, 161 (6th Cir. 1980). In *Poulis v. State Farm Free and Casualty Company*, the Court identified several factors to consider before applying the extreme sanction of dismissal. 747 F.2d 863, 868-70 (3rd Cir. 1984). These factors are:

(1) the extent of the party's personal responsibility;

(2) the prejudice to the adversary counsel by failure to meet scheduling orders and respond to discovery;

(3) whether there was a history of dilatoriness;
(4) whether the conduct of the party or the attorney was willful or in bad faith;
(5) the effectiveness of sanctions other than dismissal; and
(6) the meritoriousness of the claim or defense. |

Having considered these factors, this Court is satisfied that the history of plaintiff pro se's conduct in this case is more than sufficient to warrant a dismissal.

First, this Court finds plaintiff pro se is personally responsible for any action he has taken. Second, plaintiff pro se's actions have been prejudicial to defendants. Defendants have been forced to conclude an arduous and prolonged discovery period and prepare all pretrial instruments without the benefit of knowing plaintiff pro se's witnesses or what his exhibits will be at trial. They have been forced to spend an inordinate amount of time responding to frivolous and harassing motions and appeals. This has prejudiced defendants' preparation for trial and the Court's ability to prepare for the trial of this matter. Third, this Court finds plaintiff pro se's dilatoriness clear. This case is over four years old and plaintiff pro se would have it go on indefinitely until he felt he was ready to go to trial. If every case proceeded as plaintiff pro se wishes this case would, the judicial system would be nothing more than an instrument for harassment. Fourth, this Court finds it unquestionable that plaintiff pro se's conduct implies willfulness and bad faith, particularly his conduct during discovery. Fifth, the Court finds the sanction of dismissal is the only alternative to protect the integrity of pretrial procedures. *Accord Carter*, 636 F.2d at 161. If defendants were forced to go to trial at this time based on the little information they have been given to prepare their defense, they would be severely prejudiced. Moreover, it would be a waste of this Court's time to allow plaintiff pro se to present a case he has not prepared. Allowing him further time to prepare his case would also be prejudicial to defendants and a waste of this Court's time. If after four years, plaintiff still wants to change the wording in a subheading to his complaint, is not sure who was on the panels and committees that supposedly discriminated against him and continues to file endless frivolous motions, this Court has reason to believe plaintiff pro se will not be prepared to go to trial within any

reasonable amount of time. To allow him further extensions even if he paid the expenses of the same would be nothing more than a reward for his vexatious conduct and would allow him to achieve what he has sought to gain, more time to harass the defendants at everyone's expense. Sixth, this Court can hardly assess the merit of plaintiff pro se's claims of discrimination because he has not produced a shred of evidence of disparate treatment, nor has he produced any evidence in support of his libel claim or any other claim he may properly bring. This Court has every reason to believe based merely upon his contumacious conduct throughout the proceedings in this case, that plaintiff pro se's claims are devoid of any merit.

Plaintiff pro se's "failure to take reasonable steps to provide . . . basic information frustrated all hope of molding this case into a justiciable posture." *Von Poppenheim*, 442 F.2d at 1053. This Court will not fall victim to nor tolerate plaintiff pro se's failure to proceed with his action in good faith. His dilatory and otherwise vexatious tactics have resulted in unnecessary burdens on the Court and opposing parties. Therefore, not only will plaintiff pro se's action be dismissed with prejudice, but he will be required to pay defendants' costs and attorney fees in defending this action. *See Hall v. Cole*, 412 U.S. 1, 4-5 (1973); *F.D. Rich Co. v. United States ex rel Industrial Lumber Co.*, 417 U.S. 116, 129-30 (1974); *Sterling Energy, Ltd. v. Friendly Nat. Bank*, 744 F.2d 1433, 1438 (10th Cir. 1984); *In re Sanctions of Baker*, 744 F.2d 1438, 1440 (10th Cir. 1984); *D&H Marketers, Inc. v. Freedom Oil & Gas, Inc.*, 744 F.2d 1443 (10th Cir. 1984); *see also Sickle v. Holloway*, No. 85-1612 (10th Cir. May 28, 1986), p. 9. The parties will be allowed ten (10) days in which to attempt to agree upon the amount of attorney's fees defendants are entitled to receive, in the absence of agreement, defendants should apply to the Court with supporting affidavits and time records for attorney fees. Plaintiff pro se will then have ten (10) days to respond.

ENTERED this *16* day of June, 1986.

LEE R. WEST
UNITED STATES DISTRICT JUDGE

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES INVOLVED

Federal Rules of Civil Procedure

Rule 16 (f) Sanctions. If a party or party's attorney fails to obey a scheduling or pretrial order, or if no appearance is made on behalf of a party at a scheduling or pretrial conference, or if a party or party's attorney is substantially unprepared to participate in the conference, or if a party or party's attorney fails to participate in good faith, the judge, upon motion or his own initiative, may make such orders with regard thereto as are just, and among others any of the orders provided in Rule 37(b)(2)(B), (C), (D). In lieu of or in addition to any other sanction, the judge shall require the party or the attorney representing him or both to pay the reasonable expenses incurred because of any noncompliance with this rule, including attorney's fees, unless the judge finds that the noncompliance was substantially justified or that other circumstances make an award of expenses unjust.

Rule 37 (b) Failure to comply with order.

(2) Sanctions by court in which action is pending. If a party or an officer, director, or managing agent of a party or a person designated under Rule 30(b)(6) or 31(a) to testify on behalf of a party fails to obey an order to provide or permit discovery, including an order made under subdivision (a) of this rule or Rule 35, or if a party fails to obey an order entered under Rule 26(f) the court in which the action is pending may make such orders in regard to the failure as are just, and among others the following:

(A) An order that the matters regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;

(B) An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting him from introducing designated matters in evidence;

(C) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the

action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party;

(D) In lieu of any of the foregoing orders or in addition thereto, an order treating as a contempt of court the failure to obey any orders except an order to submit to a physical or mental examination;

(E) Where a party has failed to comply with an order under Rule 35(a) requiring him to produce another for examination, such orders as are listed in paragraphs (A), (B), and (C) of this subdivision, unless the party failing to comply shows that he is unable to produce such person for examination.

In lieu of any of the foregoing orders or in addition thereto, the court shall require the party failing to obey the order or the attorney advising him or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

Rule 56. Summary Judgment

(b) For Defending Party. A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof.

STATUTES

31 U.S.C. § 3729. False claims

(a) Liability for certain acts. Any person who-

(1) knowingly presents, or causes to be presented, to an officer or employee of the United States Government or a member of the Armed Forces of the United States a false or fraudulent claim for payment or approval;

(2) knowingly makes, uses, or causes to be made or used, a false record or statement to get a false or fraudulent claim paid or approved by the Government;

(3) Conspires to defraud the Government by getting a false or fraudulent claim allowed or paid;

(4) has possession, custody, or control of property or money used, or to be used, by the Government and, intending to defraud the

Government or willfully to conceal the property, delivers, or causes to be delivered, less property than the amount for which the person receives a certificate or receipt;

(5) authorized to make or deliver a document certifying receipt of property used, or to be used, by the Government and, intending to defraud the Government, makes or delivers the receipt without completely knowing that the information on the receipt is true;

(6) knowingly buys, or receives as a pledge of an obligation or debt, public property from an officer or employee of the Government, or a member of the Armed Forces, who lawfully may not sell or pledge the property; or

(7) knowingly makes, uses, or causes to be made or used, a false record or statement to conceal, avoid, or decrease an obligation to pay or transmit money or property to the Government,

is liable to the United States Government for a civil penalty of not less than $5,000 and not more than $10,000, plus 3 times the amount of damages which the Government sustains because of the act of that person, except that if the court finds that-

(A) the person committing the violation of this subsection furnished officials of the United States responsible for investigating false claims violations with all information known to such person about the violation within 30 days after the date on which the defendant first obtained the information;

(B) such person fully cooperated with any Government investigation of such violation; and

(C) at the time such person furnished the United States with the information about the violation, no criminal prosecution, civil action, or administrative action had commenced under this title with respect to such violation, and the person did not have actual knowledge of the existence of an investigation into such violation;

the court may assess not less than 2 times the amount of damages which the Government sustains because of the act of the person. A person violating this subsection shall also be liable to the United States Government for the costs of a civil action brought to recover any such penalty or damages.

(b) Knowing and knowingly defined. For purposes of this section, the terms "knowing" and "knowingly" mean that a person, with respect to information-

(1) has actual knowledge of the information;

(2) acts in deliberate ignorance of the truth or falsity of the information; or

(3) acts in reckless disregard of the truth or falsity of the information, and no proof of specific intent to defraud is required.

(c) Claim defined. For purposes of this section, "claim" includes any request or demand, whether under a contract or otherwise, for money or property which is made to a contractor, grantee, or other recipient if the United States Government provides any portion of the money or property which is requested or demanded, or if the Government will reimburse such contractor, grantee, or other recipient for any portion of the money or property which is requested or demanded.

(d) Exemption from disclosure. Any information furnished pursuant to subparagraphs (A) through (C) of subsection (a) shall be exempt from disclosure under section 552 of title 5.

(e) Exclusion. This section does not apply to claims, records, or statements made under the Internal Revenue Code of 1954.

31 U.S.C. § 3730. Civil actions for false claims

(a) Responsibilities of the Attorney General. The Attorney General diligently shall investigate a violation under section 3729. If the Attorney General finds that a person has violated or is violating section 3729, the Attorney General may bring a civil action under this section against the person.

(b)Actions by private persons.

(1) A person may bring a civil action for a violation of section 3729 for the person and for the United States Government. The action shall be brought in the name of the Government. The action may be dismissed only if the court and the Attorney General give written consent to the dismissal and their reasons for consenting.

(2) A copy of the complaint and written disclosure of substantially all material evidence and information the person possesses shall be served on the Government pursuant to Rule 4(d)(4) of the Federal Rules of Civil Procedure. The complaint shall be

filed in camera, shall remain under seal for at least 60 days, and shall not be served on the defendant until the court so orders. The Government may elect to intervene and proceed with the action within 60 days after it receives both the complaint and the material evidence and information.

(3) The Government may, for good cause shown, move the court for extensions of the time during which the complaint remains under seal under paragraph (2). Any such motions may be supported by affidavits or other submissions in camera. The defendant shall not be required to respond to any complaint filed under this section until 20 days after the complaint is unsealed and served upon the defendant pursuant to Rule 4 of the Federal Rules of Civil Procedure.

(4) Before the expiration of the 60-day period or any extensions obtained under paragraph (3), the Government shall-

(A) proceed with the action, in which case the action shall be conducted by the Government; or

(B) notify the court that it declines to take over the action, in which case the person bringing the action shall have the right to conduct the action.

(5) When a person brings an action under this subsection, no person other than the Government may intervene or bring a related action based on the facts underlying the pending action.

(c) Rights of the parties to qui tam actions.

(1) If the Government proceeds with the action, it shall have the primary responsibility for prosecuting the action, and shall not be bound as a party to the action, subject to the limitations set forth in paragraph (2).

(2)(A) The Government may dismiss the action notwithstanding the objections of the person initiating the action if the person has been notified by the Government of the filing of the motion and the court has provided the person with an opportunity for a hearing on the motion.

(B) The Government may settle the action with the defendant notwithstanding the objections of the person initiating the action if the court determines, after a hearing, that the proposed settlement is fair, adequate, and reasonable under all the circumstances.

Upon a showing of good cause, such hearing may be held in camera.

(C) Upon a showing by the Government that unrestricted participation during the course of the litigation by the person initiating the action would interfere with or unduly delay the Government's prosecution of the case, or would be repetitious, irrelevant, or for purposes of harassment, the court may, in its discretion, impose limitations on the person's participation, such as-

(i) limiting the number of witnesses the person may call;
(ii) limiting the length of the testimony of such witnesses;
(iii) limiting the person's cross-examination of witnesses; or
(iv) otherwise limiting the participation by the person in the litigation.

(D) Upon a showing by the defendant that unrestricted participation during the course of the litigation by the person initiating the action would be for purposes of harassment or would cause the defendant undue burden or unnecessary expense, the court may limit the participation by the person in the litigation.

(3) If the Government elects not to proceed with the action, the person initiating the action would interfere with the Government's investigation or prosecution of a criminal or civil matter arising out of the same facts, the court may stay such discovery for a period of not more than 60 days. Such a showing shall be conducted in camera. The court may extend the 60-day period upon a further showing in camera that the Government has pursued the criminal or civil investigation or proceedings with reasonable diligence and any proposed discover in the civil action will interfere with the ongoing criminal or civil investigation or proceedings.

(5) Notwithstanding subsection (b), the Government may elect to pursue its claim through any alternate remedy available to the Government, including any administrative proceeding to determine a civil money penalty. If any such alternate remedy is pursued in another proceeding, the person initiating the action shall have the same rights in such proceeding as such person would have had if the action had continued under this section. Any finding of fact or con-

clusion of law made in such other proceeding that has become final shall be conclusive on all parties to an action under this section. For purposes of the preceding sentence, a finding or conclusion is final if it has been finally determined on appeal to the appropriate court of the United States, if all time for filing such an appeal with respect to the finding or conclusion has expired, or if the finding or conclusion is not subject to judicial review.

(d)Award to qui tam plaintiff.

(1) If the Government proceeds with an action brought by a person under subsection (b), such person shall, subject to the second sentence of this paragraph, receive at least 15 percent but no more than 25 percent of the proceeds of the action or settlement of the claim, depending upon the extent to which the person substantially contributed to the prosecution of the action. Where the action is one which the court finds to be based primarily on disclosures of specific information (other than information provided by the person bringing the action) relating to allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government Accounting Office report, hearing, audit, or investigation, or from the news media, the court may award such sums as it considers appropriate, but in no case more than 10 percent of the proceeds, taking into account the significance of the information and the role of the person bringing the action in advancing the case to litigation. Any payment to a person under the first or second sentence of this paragraph shall be made from the proceeds. Any such person shall also receive an amount for reasonable expenses which the court finds to have been necessarily incurred, plus reasonable attorneys' fees and costs. All such expenses, fees, and costs shall be awarded against the defendant.

(2) If the Government does not proceed with an action under this section, the person bringing the action or settling the claim shall receive an amount which the court decides is reasonable for collecting the civil penalty and damages. The amount shall be not less than 25 percent and not more than 30 percent of the proceeds of the action or settlement and shall be paid out of such proceeds. Such person shall also receive an amount for reasonable expen-

ses which the court finds to have been necessarily incurred, plus reasonable attorneys' fees and costs. All such expenses, fees, and costs shall be awarded against the defendant.

(3) If the Government does not proceed with the action and the person bringing the action conducts the action, the court may award to the defendant its reasonable attorney's fees and expenses if the defendant prevails in the action and the court finds that the claim of the person bringing the actions was clearly frivolous, clearly vexatious, or brought primarily for purposes of harassment.

(e) Certain actions barred.

(1) No court shall have jurisdiction over an action brought by a former or present member of the armed forces under subsection (b) of this section against a member of the armed forces arising out of such person's service in the armed forces.

(2)(A) No court shall have jurisdiction over an action brought under subsection (b) against a Member of Congress, a member of the judiciary, or a senior executive branch official if the action is based on evidence or information known to the Government when the action was brought.

(B) For purposes of this paragraph, "senior executive branch official" means any officer or employee listed in section 201(f) of the Ethics in Government Act of 1978 (5 U.S.C. App.).

(3) In no event may a person bring an action under subsection (b) which is based upon allegations or transactions which are the subject of a civil suit or an administrative civil money penalty proceeding in which the Government is already a party.

(4)(A) No court shall have jurisdiction over an action under this section based upon the public disclosure of allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government Accounting Office report, hearing, audit, or investigation, or from the news media, unless the action is brought by the Attorney General or the person bringing the action is an original source of the information.

(B) For purposes of this paragraph, "original source" means an individual who has direct and independent knowledge of the information on which the allegations are based and has voluntari-

ly provided the information to the Government before filing an action under this section which is based on the information.

(f) Government not liable for certain expenses.

The Government is not liable for expenses which a person incurs in bringing an action under this section.

(g) Fees and expenses to prevailing defendant.

In civil actions brought under this section by the United States, the provisions of section 2412(d) of title 28 shall apply.

(h) Any employee who is discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated against in the terms and conditions of employment by his or her employer because of lawful acts done by the employee on behalf of the employee or others in furtherance of an action under this section, including investigation for, initiation of, testimony for, or assistance in an action under this section, including investigation for, initiation of, testimony for, or assistance in an action filed or to be filed under this section, shall be entitled to all relief necessary to make the employee whole. Such relief shall include reinstatement with the same seniority status such employee would have had but for the discrimination, 2 times the amount of back pay, interest on the back pay, and compensation for any special damages sustained as a result of the discrimination, including litigation costs and reasonable attorneys' fees. An employee may bring an action in the appropriate district court of the United States for the relief provided in this subsection.

31 U.S.C. § 3731 False Claims Procedure

(a) A subpoena requiring the attendance of witness at a trial or hearing under section 3730 of this title [31 U.S.C. § 3730] may be served at any place in the United States.

(b) A civil action under section 3730 may not be brought

(1) more than 6 years after the date on which the violation of section 3729 is committed, or

(2) more than 3 years after the date when facts material to the right of action are known or reasonably should have been known by the official of the United States charged with responsibility to act in the circumstances, but in no event more than 10 years after the date on which the violation is committed,

whichever occurs last.

(c) In any action brought under section 3730, the United States shall be required to prove all essential elements of the cause of action, including damages, by a preponderance of the evidence.

(d) Notwithstanding any other provision of law, the Federal Rules of Criminal Procedure, or the Federal Rules of Evidence, a final judgment rendered in favor of the United States in any criminal proceeding charging fraud or false statements, whether upon a verdict after trial or upon a plea of guilty or nolo contendere, shall estop the defendant from denying the essential elements of the offense in any action which involves the same transaction as in the criminal proceeding and which is brought under subsection (a) or (b) of section 3730.

42 U.S.C. §1988

[In] any action or proceeding to enforce a provision of sections 1977, 1978, 1979, 1980, and 1981 of the Revised Statutes [42 USC §§ 1981-1983, 1985, 1986], title IX of Public Law 92-318 [20 USC §§ 1681 et seq.], or title VI of the Civil Rights Act of 1964 [42 USC §§ 2000d et seq.], the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the cost.

I AMENDMENT

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Rule 105(A), U.S. District Court for Colorado.

Bills of cost and motions to tax costs including clams for attorney fees must be made on or before ten (10) days after entry of judgment. No attorney fees supplementary to a judgment will be awarded for any services rendered after the date of issuance of these rules unless the requesting party submits clear, meticulous, contemporaneous time and expense records reflecting all hour for which compensation is requested and the allotment of those hours to the specific tasks performed.